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# **Anti-Corruption Policy in the EU and Reflexive Governance**

**by**

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Thesis submitted in partial fulfilment of the requirements for a Doctor of  
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## **Dedication**

To my parents, sister, extended Albanian family and my PhD supervisor.

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## **Declaration**

I declare that this thesis is my original work and that it has never been submitted for publication or for examination in any institution of higher learning.

**Andi Hoxhaj**

## **Abstracts**

This thesis, by evaluating the EU Anti-Corruption Report 2014 and its impact, analyses the development of EU anti-corruption as a policy field. In order to identify key factors that shape anti-corruption policy in Europe, it applies the theory of reflexive governance to anti-corruption policymaking in the EU. The approach of reflexive governance focuses on the new form of interaction between the EU, Member States and Candidate States, in particular the dialogical nature of their relationships and how they influence each other in building ground and incentives for the sustainable development of anti-corruption as a policy field. The dissertation begins with an examination of the four stages of the development of anti-corruption as a policy field in the EU so far. Questions are asked about the involvement of non-state actors in anti-corruption policy making and to what extent Member States and Candidate States have involved non-state actors in shaping anti-corruption policy in the national context. The main part of the thesis is devoted to presenting and applying the theory of reflexive governance in analysing the EU Anti-Corruption Report and its impact and achievement in the UK, Romania and Albania. In its last part, the thesis discusses insufficiencies of the EU Anti-Corruption Report 2014 and offers recommendations for future EU Anti-Corruption Reports, in particular by making proposals how the legal framework can be improved in relation to the protection of whistleblowers. The thesis also makes suggestions how the EU, Member States and Candidate States can make further use of reflexive governance in order to enhance their anti-corruption policies.

## **Introduction**

Since the fall of the iron curtain and the subsequent attempts to enlarge the EU towards Central and Eastern Europe, corruption has emerged as a major policy issue. The EU has engaged with Member States and Candidate States in improving their social and economic developments that are affected by corruption. In its Communications on corruption in 1997 and in particular in 2003 the EU Commission has encouraged Member States and Candidate States to implement international anti-corruption measures promulgated by the UN, the OECD, and the Council of Europe. Furthermore, as part of the pre-accession process for Central and Eastern European states, the EU, through conditionality, supported post-communist countries to develop anti-corruption policy fields. This EU influenced development of anti-corruption policies can be characterised as a success because most of the Member States and Candidate States nowadays have in place adequate anti-corruption plans, laws and policies. However, there is still a lack of implementation and involvement of non-state actors in anti-corruption policy-making.

This thesis does not offer a systemic treatment of the causes of the issue of corruption in Europe. It has a more modest aim and focuses on the latest development in attempts to establish a separate policy field of anti-corruption policy in the EU. This attempt is the EU Anti-Corruption Report. In my analysis, I evaluate how the EU Anti-Corruption Report supports Member States in supporting their own efforts to establish a comprehensive anti-corruption policy field and how the involvement of non-state actors in anti-corruption policy-making is strengthened. The theory used in this analysis is the reflexive governance approach and it will show how the EU, Member States and Candidate States can make better use of the reflexive governance to develop comprehensive anti-corruption policy. The argument of the thesis is developed in five steps and set out in five chapters.

**Chapter 1** presents an analysis of the evolution of EU anti-corruption law and policy since 1997 leading to the EU Anti-Corruption Report in 2014. It

divides the development into four stages. It investigates motives behind the first communication on the issue of corruption by the EU Commission in 1997, in particular in relation to enlargement of the EU in order to integrate former socialist countries in Central and Eastern Europe. In the second stage, EU policy focuses on measures addressing corruption within EU institutions. The third stage is characterised by redefining the relationship of EU and international anti-corruption policies and I interpret the latest efforts as attempts in developing anti-corruption as a separate policy field in the EU. The last part of the chapter will pay particular attention to assessing the processes that surrounded the introduction of the EU Anti-Corruption Report.

**Chapter 2** introduces the EU Anti-Corruption Report and its content. It looks at the rationale behind the establishment of the Report as an anti-corruption reporting mechanism. The chapter is divided into four main parts. The first part investigates the motives of the EU Commission to introduce the Report, as well as its objectives and targets. The second part of the chapter presents the perceptions of corruption and experience of corruption in the EU as portrayed in the Report. The third part of chapter discusses the thematic chapter in the EU Anti-Corruption Report, which the Report has dedicated to public procurement. The last part of the chapter analyses the recommendations that the EU Anti-Corruption Report has issued for all of the 28<sup>th</sup> Member States in 2014.

**Chapter 3** examines the regulatory approach of the EU Anti-Corruption Report and argues that it is best explained as a form of reflexive governance. The chapter is divided into four different parts. The first part explains the context of the regulatory approach of the Report, which relates to the emergence of new modes of governance in the EU. It involves a discussion of the key method of the new governance approach in the EU, the open method of coordination, which has considerably changed the regulation and methods of governance at the supranational level. The second part introduces the concept of reflexive governance and explains the transformation of new governance into reflexive governance in EU policy-

making. The second part also explains the growing use of reflexive forms of governance within the EU and shows paradigms how reflexive governance occurs. The third part introduces the theory of reflexive law that provides key insights into the regulatory nature of reflexive governance. The fourth part applies the theory of reflexive governance to the EU Anti-Corruption Report and proposes that the concept of regulation of self-regulation provides the crucial insight into the governance approach of the EU Anti-Corruption Report.

**Chapter 4** presents the first findings on the achievements and impact of the EU Anti-Corruption Report in its first two years of operation. The insights are derived from three case studies on the United Kingdom, Romania and Albania and the chapter is accordingly divided into three main parts. The first part on the UK explains the recommendations that the EU Anti-Corruption Report issued for the UK and how the UK has applied the recommendations into concrete policy actions. It also evaluates to what extent the UK is characterised by reflexive governance in developing its own anti-corruption policy field and the interplay with the EU in improving its anti-corruption policy. The second part on Romania explains the recommendations of the EU Anti-Corruption Report issued for Romania and observes how the EU approach to Romania and the anti-corruption policy reforms that Romania has implemented prior and after accession, with a particular focus on the post-accession instrument known as the Cooperation and Verification Mechanisms. Furthermore, the chapter analyses the efforts Romania has made in applying the recommendations of the EU Anti-Corruption Report and to what extent Romania engages in reflexive governance in establishing its own anti-corruption policy field. The third part on Albania analyses the steps Albania has taken in developing an anti-corruption policy field since 1990. It distinguishes three different phases in the establishing of anti-corruption policy after the downfall of the communist regime. It evaluates the support of the EU to encourage Albania in its efforts in establishing an anti-corruption policy field. Last it asks whether the interaction between the EU and Albania reveals forms of reflexive governance.

**Chapter 5** summarises the results of the foregoing analysis of the EU Anti-Corruption Report and it addresses key areas of relevance for future EU Anti-Corruption policies. It is divided into two main parts. The first part assesses achievements of the EU Anti-Corruption Report in its efforts to establish a comprehensive anti-corruption policy field. The second part offers key recommendations for the second EU Anti-Corruption Report and suggests areas that the EU Commission could pay closer attention in future Reports. Both sections offer an evaluation from the perspective of the theory of reflexive governance. My analysis in this chapter provides examples where reflexive governance occurred as a result of the achievements and impact that the EU Anti-Corruption Report. Furthermore, my analysis offers recommendations how future EU Anti-Corruption Reports could be strengthened by making further use of reflexive governance mechanisms and how reflexive governance can be helpful to Member States and Candidate States in developing their own anti-corruption policies.

## Chapter 1

### 1 History of the EU Anti-Corruption Policy

Corruption is not a new phenomenon and it is considered as one of the biggest challenges for all societies in the world, including European societies. However, it was only in the 1990s, in particular after all the fall of the Iron Curtain, that it first emerged as a policy problem that could no longer be addressed by Member States and the EU only through domestic means. Since the early 1990s, corruption scandals have made the headlines all around the world, in institutions, organisations and largely in politics. These chains of events have exploded the myth that corruption is a systemic issue and it affects all societies, especially those with a relatively new democracy like the Central and Eastern European states.

The growing complication of corrupt practices presents a significant challenge for anti-corruption policy success and those anti-corruption institutions that operate in fighting corruption. In a globalised world which is characterised by rising flows of capital, goods, people, information and knowledge, corrupt practices do not only take place within national contexts but also across borders.<sup>1</sup> The EU enlargement has increased political and economic integration, and thus corruption can be seen as a cross-border problem that concerns all of the Member States, even when corruption occurs at local or national level. As a result, the globalisation of corruption can have great implications for anti-corruption policy efforts, which have traditionally been within the responsibility of national policy and law-making. Over the last two decades, efforts were attempted for collectively addressing the issue of corruption at international level by introducing international conventions against corruption, as well as at EU level, by developing anti-corruption as a policy field. Although the fight against corruption has not always been high on the EU agenda, in recent years the EU has taken more rigorous steps in addressing the issue of corruption. In accordance with Ralf Rogowski, one can distinguish four

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<sup>1</sup> Teixeira, A., Pimenta, C., Maia, A. and J. A. Moreira (2015), *Corruption, Economic Growth and Globalization*. London and New York: Routledge, pp. 41-51.

phases in the development of EU anti-corruption policy as a policy field.<sup>2</sup>

### 1.1 The first phase

The EU and others in the international organisations started to address the issue of corruption as a policy concern during the mid-1990s in the process of preparation for the European Union enlargement expansion that took place in 2004 and 2007.<sup>3</sup> According to Patrycja Szarek-Mason, Transparency International in 1995, in its memorandum to the EU institutions, was the first to identify that, ‘the EU was not aware fully of its role in fighting corruption; rather, it leaves the issue of corruption to the EU Member States or to other international organisations working on corruption.’<sup>4</sup>

The first phase can be characterised as starting in 1997 when the EU Commission revealed its objectives to develop a far-reaching anti-corruption policy at EU level. The EU Commission issued its first Communication on the EU policy against corruption later in 1997, which is the first EU policy document to focus primarily on the issue of corruption.<sup>5</sup> The EU Commission highlighted that corruption was affecting fair competition in the EU and corruption challenged the principles of open and free markets in the EU. In particular, corruption affected the proper functioning of the internal market, the financial interests of the European Communities and international trade. Furthermore, the EU Commission, in its Communication on the EU policy against corruption, stated that corruption affected also the functioning of good governance and the rule of Law.<sup>6</sup> The EU Commission declared in 1997 that it had three main objectives in developing an anti-corruption policy to protect: the

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<sup>2</sup> Rogowski, R. (2010), ALACs and the Concept of Citizen Participation in the Light of European Law (October 25, 2010 Warwick School of Law Research Paper No. 2010/25.

<sup>3</sup> Schmidt-Pfister, D and H. Moroff (2013), *Fighting Corruption in Eastern Europe: A Multilevel Perspective*, New York: Routledge, pp. 104-105.

<sup>4</sup> Mason-Szarek, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press, p. 78.

<sup>5</sup> European Commission (1997), Communication on a comprehensive EU policy against corruption, COM/1997/0317 final.

<sup>6</sup> Csonka, P., (1997) ‘Corruption: The Europe Commission’s Approach’ in B. A. K. Rider (ed.), *Corruption: The Enemy Within* (Kluwer Law International, 1997), 343–353.



Community's financial interests, officials of the Community or of the Member States, and the private sector. In all three areas there were legal instruments in place. However, as history will show, the implementation in the EU member states remained inadequate.

The EU Commission, in its first Communication on EU policy on fighting corruption in 1997, also specified its first definition of corruption as 'any abuse of power or impropriety in the decision making process brought about by some undue inducement or benefit'.<sup>7</sup> In 1998 the European Court of Auditors accepted this definition.<sup>8</sup> However, the EU's definition of corruption as the 'abuse of power for private gain' is very broad to include most forms of corruption that they are and thus it makes it hard to work with this definition. There were questions over how to define concepts such as 'abuse of power' or 'private gain'. This is because it is rather difficult to define clearly how big the private gain should be in order to fall under the EU definition. In accordance with Patrycja Szarek-Mason, this 'definition starts from the assumption that a concrete, formal and informal system of laws and norms exists which is accepted by all sides' which is not the case.<sup>9</sup> The EU Commission's definition of corruption is broad, going beyond current EU legislation and focusing on active or passive bribery; besides the narrow criminal law definition, it also embraces a socio-economic element aiming at corruption prevention in the context of good governance.<sup>10</sup>

To this day, defining corruption still remains a challenging issue that stimulates debate on accepting a common definition. The EU, when it comes to refining and developing an acceptable definition by all of the Member States, must take into account as many voices and perspectives as possible. Definitions and perceptions of corruption vary across many

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<sup>7</sup> European Commission (1997), Communication On a comprehensive EU policy against corruption, COM/1997/0317 final.

<sup>8</sup> Court of Auditors, 'Special Report No. 8/98', OJ C 230, 22 July 1998.

<sup>9</sup> Mason-Szarek, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 10.

<sup>10</sup> Mason-Szarek, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 11.

Member States, depending on their political, cultural and social traditions. Thus, coming to a collective definition of corruption is far from easy. Some would argue that it is almost impossible to measure the level of corruption across all of the Member States because the legal definitions, as well as the cultural understandings of a corrupt act, do vary significantly from one country to another. Therefore, the EU Commission should aim at adopting a concept that can embrace various definitions of corruption across societies in the European Union.

After the first Communication against corruption, the EU Commission at the same time also recommended a range of measurements, such as the introduction of accounting and auditing standards, blacklisting of corrupt companies and banning of tax deductibility to the EU Member States.<sup>11</sup> The objective of the EU Commission was at the time to formulate an EU strategy on corruption within its borders,<sup>12</sup> because corruption just started to be viewed as a serious crime with a cross-border dimension and thus it was linked with other forms of serious crime, such as trafficking of human beings, money-laundering and the narcotic trade.<sup>13</sup> Furthermore, anti-corruption policy became an issue for the EU at the time due to the accession process for the Central and Eastern European states that acceded to the EU later.

In 1998, the European Commission's overall report on progress towards accession by candidate countries states that: The fight against corruption needs to be strengthened further. The efforts undertaken by the candidate countries are not always commensurate with the gravity of the problem. Although a number of countries are putting in place new programs on control and prevention, it is too early to assess the effectiveness of such measures. There is a certain lack of determination to confront the issue and

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<sup>11</sup> Action plan to combat organized crime (Adopted by the Council on 28 April 1997 (OJ C 131 of 15.8. 1997

<sup>12</sup> European Commission (1997), Communication On a comprehensive EU policy against corruption, COM/1997/0317 final.

<sup>13</sup> The Council [1] adopted the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector [2] pursuant to Title VI of the Treaty on European Union.

to root out corruption in most of the candidate countries.<sup>14</sup>

This statement reflects the EU Commission's own Regular Reports on each of the candidate country's progress towards accession. Later, the EU Commission, in its conclusions of the individual country evaluations, considered that corruption was a serious source of concern in Bulgaria, Czech Republic, Poland, Romania and Slovakia, an ongoing problem in Hungary, Latvia and Lithuania and an issue of concern in Estonia and Slovenia. These and other later assessments in 2001 concluded that, in the view of the EU Commission, corruption remained as a serious issue of concern, if not a potential barrier for EU accession.<sup>15</sup> The EU Commission often did express its concern for the high levels of corruption in the EU Candidate States and stressed out on many occasions that making progress in the fight against corruption is a precondition for all Candidate States in order to fulfil the conditions for EU membership.

According to Stephan Leibfried, post-communist countries in the EU are viewed as more vulnerable to corruption due to their inadequate institutional structures and their nature of transition to a functioning democratic state.<sup>16</sup> Evaluating the levels of corruption in Candidate States has proven to be a very challenging case for the EU Commission. Not because corruption in Central and East European States is different to the corruption issues faced by Member States, but because the European Union lacked at the time a coherent anti-corruption policy and framework.<sup>17</sup> Since the EU lacked a clear anti-corruption framework, the EU Commission did not establish any clear benchmarks for Candidate States in the area of corruption and anti-corruption policy. The absence of a clear anti-corruption framework brought many issues to the EU.

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<sup>14</sup> European Commission (1998), Composite Paper: Reports on Progress towards Accession by Each of the Candidate Countries. 4 November 1998, p. 6.

<sup>15</sup> Miller, W.L., Grodeland, A. B. and Y. T. Koshechkina (2001), *A Culture of Corruption?: Coping with Government in Post-communist Europe*. Budapest Central European University Press, p. 279.

<sup>16</sup> Leibfried, S. (2015), *The Oxford Handbook of Transformations of the State*. Oxford: Oxford University Press, p. 607.

<sup>17</sup> Mason-Szarek, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 10

Firstly, in the absence of a clear framework for assessing the extent, causes and nature of corruption in CEE countries, the EU Commission had to evaluate corruption on a basis that tends towards criminal law. Such an approach neglected some key aspects of corruption-related issues in the CEE countries, varying from societal tolerance of corruption to more or less deep-rooted traditions of allocating resources on the basis of close networks, as was the common practice in the communist era.

Secondly, the Copenhagen mandate allowed the EU Commission to push for anti-corruption policies from Candidate States, which the EU was unable to enforce on the old Member States. The EU Commission regularly pushed Candidate States to sign and ratify the Council of Europe Criminal Law Convention on Corruption, and by 2002 eight of the ten Candidate States implemented the Convention, compared to only three out of fifteen old Member States having adopted it. This gave rise to a perception that Candidate Countries were being held to different criteria from those within the EU.

These factors illustrated above have made the integration of any anti-corruption policy goal into the accession process very challenging. Furthermore, the main focus of accession negotiations on harmonisation and implementation of the *acquis communautaire* limited the scope for inclusion of anti-corruption policy. Thus, the anti-corruption *acquis* was limited and effectiveness of anti-corruption policy was beyond the scope of EU policy field.

Therefore, the situation appeared that a number of Candidate States, in which corruption had been persistent as a serious problem, were admitted to the European Union. This situation was later a cause of concern for two key reasons. Firstly, the EU paid less attention to the issue of corruption, because it undermined the proper implementation of the *acquis*, even though there are cumulative signs that corruption in some Member States was a major threat to the functioning of democracy and the market. Secondly, the high level of corruption and inadequate anti-corruption policies in a number of Candidate States undermined the implementation of

the *acquis* and the quality of institutions. Corruption did undermine some fundamental values to which the European Union subscribes and presented the EU Commission with additional challenges to establishing effective instruments and mechanisms that would promote more effective anti-corruption policy in all the Member States.

## **1.2 The second phase**

The second phase can be characterised with internal problems that the EU institutions faced in 1999 when the Santer Commission had to resign over serious allegations of corruption. The collapse of the Santer Commission exposed the necessity to implement effective measurements for the protection of the European Public Administration's integrity.<sup>18</sup> In response to the collapse of the Santer Commission, the UCLAF at the time (*Unité de Coordination de La Lutte Anti-Fraude*) an anti-fraud unit, whose responsibility was to investigate corruption in the EU institutions was then replaced by the European Anti-Fraud Office (OLAF)<sup>19</sup>

OLAF is an independent administrative body entrusted with powers to investigate cases related to fraud and corruption, as well as other illegal activity affecting the Community budget. The mission of OLAF was set up to protect the financial interests of the EU in fighting corruption and any other illegal activities, as well as to protect the reputation of the European Institutions. Furthermore, OLAF was entrusted with power to investigate any misconduct of the EU institutions personnel that might result in disciplinary or criminal proceedings. OLAF also supported the EU Commission in developing and implementing anti-corruption policy. The objective for establishing OLAF was to create an institution that is more effective and has more independence than its predecessor UCLAF.

As a result the EU Commission, during the second phase, started a process of developing a broad good governance framework, in particular with the

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<sup>18</sup> Council of Europe (2001), *Anti-Corruption Measures*. pp. 17

<sup>19</sup> European Commission (1999), Decision of 28 April 1999 Establishing the European Anti-Fraud Office. (OLAF), OJ L 13620, 31.5.1999.

publication of the White Paper on European Governance in 2001.<sup>20</sup> The White Paper set out a strategy for the reform of the EU Commission, based on principles of accountability, independence and transparency.<sup>21</sup> The reforms included the establishment of a new internal audit service, improving public access to documents of the European Parliament, the Council and the Commission, as well as revising the EU career system, enhancing and fraud prevention legislations.<sup>22</sup>

The White Paper also supported the development of a Code of Conduct for Members of the European Parliament and laid the basis for a code for the EU Commission officials. In light of the collapse of the Santer Commission, stories circulating in early 2002 of another report by the same whistleblower for ongoing misconducts at the level of the Commission.<sup>23</sup> The Santer Commission resignation in late 2002 and the suspension of the Commission's former chief accountant, marked the start of good governance regime and the start of where the EU Commission had the capacity to translate concerns about corruption into concrete anti-corruption action.<sup>24</sup>

Furthermore, the EU Commission at this time undertook numerous important initiatives to promote accountability and transparency within the EU institutions more seriously. It implemented a series of measurements that were aimed at improving integrity among its staff, which included the adoption of codes of conduct for EU Commissioners and the commission staff,<sup>25</sup> and a decision setting rules for the Commission staff on how to

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<sup>20</sup> European Commission (2001), White Paper on European Governance, COM (2001) 428 final. pp. 7-11.

<sup>21</sup> European Commission (2001), White Paper on European Governance, COM (2001) 428 final. pp. 7-11.

<sup>22</sup> Wakefield, J. (2007), *The Right to Good Governance*. Alphen aan de Rijn: Kluwer Law International, pp. 31-33.

<sup>23</sup> Vandekerckhove, W. (2006), *Whistleblowing and Organizational Social Responsibility: A Global Assessment*. Hampshire: Ashgate Publishing, pp. 273 – 274.

<sup>24</sup> Thüsing, G. and G. Forst (2016), *Whistleblowing - A Comparative Study*. London: Springer, p. 341.

<sup>25</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 72.

report serious wrongdoings also related to corruption.<sup>26</sup> The EU Commission also acknowledged at this time that transparency is a significant element to prevent corruption and fraud, and as a result<sup>27</sup> the European Transparency Initiative was then launched, aiming at inspiring a dialogue on areas where transparency at the EU level appeared to be necessary for further improvement.<sup>28</sup> Examples include the publication of data about beneficiaries of EU funds, regulation of lobbying, strengthening the ethics in the EU institutions, and adjusting the regulation of access to documents at the EU level.<sup>29</sup>

Further efforts were also taken by the Council of Europe in developing twenty Guiding Principles<sup>30</sup> to fight corruption at European level more successfully. The twenty Guiding Principles supported the national anti-corruption policy, as they regulate nearly all areas of public administration that relate to preventing and fighting corruption within a public administration. The twenty Guiding Principles not only supported countries to prevent corruption, but also to develop a wide range of precautionary measurements. For example, this included raising public awareness, ethical behaviour, independence of the judiciary and prosecution, restrictions of immunity for public officials, specialisation of individuals and institutions in fighting corruption, as well as supporting more codes of conduct for public officials and adequate auditing procedures for public administration, supervision of financing of political parties and freedom of media.<sup>31</sup>

These twenty Guiding Principles are a form of soft law measurements. They are not legally binding and national governments are only encouraged

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<sup>26</sup> European Commission (2003), 'Communication on Comprehensive EU Policy Against Corruption', COM(2003) 317 final.

<sup>27</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 84.

<sup>28</sup> European Commission (2006), 'Green Paper on European Transparency Initiative', COM(2006) 194 final.

<sup>29</sup> European Commission (2006), 'Protection of the Communities' financial interests – Fight against fraud – Annual report 2005', COM(2006) 378 final.

<sup>30</sup> Council of Europe (1997), 'Resolution (97) 24 on the twenty Guiding Principles for the Fight Against corruption' (1997)

<sup>31</sup> Eckes, C. and T. Konstadinides (2011), *Crime within the Area of Freedom, Security and Justice: A European Public Order*. Cambridge: Cambridge University Press. p. 48.

to implement these Principles when drafting their national anti-corruption policy. However, the non-binding nature has not diminished their achievement to encourage adequate anti-corruption policies. In order to monitor the performance of the twenty Guiding Principles, the Council of Europe developed an evaluation process at EU level in the form of the Group of States Against corruption (GRECO).

GRECO monitors states' compliance with the organisation's anti-corruption standards and it is an important institution in the fight against corruption within and outside the EU. GRECO's main objective is to improve its members' capacity to fight corruption more successfully by using the Council of Europe anti-corruption compliance-monitoring instruments through a process of mutual evaluation and peer pressure.<sup>32</sup> According to the Open Society Institute, GRECO reports are the closest instrument to analyse corruption, based on reliable standards, producing evaluations that can be used on a proportional basis in the area of anti-corruption policy.<sup>33</sup>

GRECO also evaluates compliance with the Council of Europe anti-corruption conventions, the Criminal Law convention on corruption (*Criminal Law convention*)<sup>34</sup> and the Civil Law convention on corruption (*Civil Law convention*)<sup>35</sup> The Criminal Law convention focuses on the criminalisation of active and passive bribery of public officials, thus also involving national and foreign officials, officials of international organisations and members of national and foreign public legislatures.<sup>36</sup> It not only included corruption and bribery, but also undue influence, which is another form of corruption, whereby benefit is given to anyone who asserts

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<sup>32</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 37.

<sup>33</sup> Schmidt-Pfister, D and H. Moroff (2013), *Fighting Corruption in Eastern Europe: A Multilevel Perspective*, New York: Routledge, pp. 104-105.

<sup>34</sup> Boister, N. and J.C. Robert (2015), *Routledge Handbook of Transnational Criminal Law*. London and New York: Routledge, pp. 79-80.

<sup>35</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 254.

<sup>36</sup> Bantekas, I. and S. Nash (2007), *International Criminal Law*. London and New York: Routledge, pp. 282.



influence over a public official or entity.<sup>37</sup> Furthermore, the Criminal Law convention guaranteed protection for informants cooperating with investigating and prosecuting authorities,<sup>38</sup> and ensured that the administrative parties assured the independence of anti-corruption institutions. Similar to the OECD convention, these convention goals are to support international cooperation in extradition cases of corruption.

In addition to the above measurements, the EU also implemented a number of anti-corruption instruments, in particular conventions on protection of the Community financial interests. However, as of mid-2002, none of these conventions were ratified by the Member States. Thus, the EU anti-corruption framework remained mainly non-binding and inadequate. There are two possible reasons for this.

Firstly, the level and nature of corruption appeared to differ widely across the Member States, reflecting different national traditions and historical backgrounds. An example is that there is a clear difference between the bureaucratic traditions of integrity and probity characteristic of the Northern EU Member States on the one hand, and the more informal style of public service characteristics of South and Eastern European Member States. These differences can be observed in numerous examples. The most prominent example is the departure of Eva Joly, the judge in charge of the investigation into the Elf Aquitaine affair in France.<sup>39</sup> The scandals that surrounded the former French President Jacques Chirac<sup>40</sup> or the former Italian Prime Minister Silvio Berlusconi,<sup>41</sup> highlighted the fact that corruption was not only a problem for Candidate States. Secondly, the EU Commission during the second phase did see corruption as a concern to implement EU policy, but it was rather left for the competence of Member

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<sup>37</sup> Bantekas, I. and S. Nash (2007), *International Criminal Law*. London and New York: Routledge, pp. 282.

<sup>38</sup> Boister, N. and J.C. Robert (2015), *Routledge Handbook of Transnational Criminal Law*. London and New York: Routledge, pp. 79-80.

<sup>39</sup> Transparency International (2007), *Global Corruption Report 2007: Corruption in Judicial Systems*. Cambridge: Cambridge University Press, pp. 84 – 88.

<sup>40</sup> Henley, J. (2013), Gigantic sleaze scandal winds up as former Elf oil chiefs are jailed. *The Guardian*, 13<sup>th</sup> November 2013 [Online], Retrieved from; <https://www.theguardian.com/business/2003/nov/13/france.oilandpetrol>

<sup>41</sup> Tänzle, D., Giannakopoulos, A., and K. Maras (2012), *The Social Construction of Corruption in Europe*. Surrey: Ashgate, p. 134.

States. Also, the Commission's inner problems with the collapse of the Santer Commission made it hard at the time to push Member States for reforms in addressing the issue of corruption in terms of policy.

For these reasons as shown above, there was a contradictory situation in the EU. On the one hand, the EU started to embark on a number of important steps to implement good governance practices at the EU administration level; on the other hand, efforts to support common anti-corruption standards and policies across existing Member States were challenging for the EU because of its own internal issues concerning corruption. This was despite the fact the EU, through the Copenhagen mandate, had sufficient power and credibility to exercise leverage over the Candidate States to implement a number of anti-corruption measurements.

The Copenhagen Council did per se clearly mention corruption as an accession criterion in the Candidate States, but the concern was included in the Regular Reports with an individual chapter in the section on political standards (*democracy and rule of law*), which highlights it as institutional issues (*the executive, judiciary, and parliament*). Corruption was generally understood as a significant issue for the public administrations in the Central and Eastern European states because of their socialist legacy.<sup>42</sup> Thus, the monitoring of corruption cut across different chapters for some Candidate States such as Customs Union, External Policies, Industrial Policy and foremost for every states the negotiation chapter 24: *Cooperation in the Field of Justice and Home Affairs*.<sup>43</sup>

Furthermore, the EU Commission went further in interpreting these arrangements into more tangible benchmarks and standards. The most concrete effort was the Annex to the Commission's 2003 Communication on a Comprehensive Policy on Corruption. In contrast to the reluctant tone that the text takes on the necessity for key measurements concerning

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<sup>42</sup> Kajsiu, B (2015), *A Discourse Analysis of Corruption. Instituting Neoliberalism Against Corruption in Albania, 1998-2005*, London and New York: Routledge, p. 83.

<sup>43</sup> Vermeulen, G. and W.D. Bondt (2014), *EU Justice and Home Affairs: Institutional and policy development*. Antwerpen and Apeldoorn; Marklu Publishers, pp. 33-34.

corruption in the EU member states, it also brings a concise checklist on the desired policies to be implemented in the EU candidate states. The recommended measurements went beyond criminal offences by encouraging more a change of culture in understanding corruption.<sup>44</sup> Some of the ‘*Ten Principles for Improving the fight against Corruption in acceding, candidate and other third Countries*’<sup>45</sup> went so far as its actual competences. For example, the call for clear rules on whistleblowing, the promotion of public intolerance of corruption by awareness-raising campaigns in the media and the need to developing transparent rules on party financing, and external financial control of political parties are examples that it went beyond its actual competences.<sup>46</sup> At this point, it was clear that the EU was moving towards another phase of its development of anti-corruption as a policy field and these developments marked the start of the third phase in the EU.

### 1.3 The third phase

The third phase can be characterised as having started in the beginning of the new millennium, as the fight against corruption gained further momentum at international level and the EU adopted important international instruments.<sup>47</sup> These include the adoption of OECD Convention on combating bribery of foreign public officials in international business transactions<sup>48</sup> and the UN Convention against corruption.<sup>49</sup> The shift of attitudes in the EU to support international initiatives such as the United Nations and the OECD, and suggesting its Member States to ratify

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<sup>44</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 21..

<sup>45</sup> European Commission (2003), Communication on Comprehensive EU Policy Against Corruption’, COM(2003) 317 final.

<sup>46</sup> European Commission (2003), Communication on Comprehensive EU Policy Against Corruption’, COM(2003) 317 final.

<sup>47</sup> Rogowski, R. (2010), ALACs and the Concept of Citizen Participation in the Light of European Law (October 25, 2010 Warwick School of Law Research Paper No. 2010/25.

<sup>48</sup> Pacini, C., Swingen, A.J. and R. Hudson (2002), ‘The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials’, *Journal of Business Ethics*, **37**(4), pp. 385-405.

<sup>49</sup> Schmidt-Pfister, D and H. Moroff (2013), *Fighting Corruption in Eastern Europe: A Multilevel Perspective*, New York: Routledge, pp. 104-105.

them,<sup>50</sup> according to Ralf Rogowski indicated that the EU at this point gave up in perusing their own policy in addressing corruption, but rather adopted international measurements.<sup>51</sup> The EU saw its role during the third phase to support international efforts against corruption and become a global player in policymaking.

The EU's objective to fight corruption was further confirmed in 2003 in the Second EU Commission Communication on a Comprehensive EU Policy against Corruption.<sup>52</sup> The EU Commission's understanding of 'comprehensive' policy meant reducing corruption at all levels in a coherent way within the EU institutions and in the EU Member States.<sup>53</sup> In the evaluation of Transparency International, the Second Communication was seen as a real game changer.<sup>54</sup> The context of the Second Communication included a number of more explicit policy recommendations for the EU Member States to undertake in comparison to the first Communication in 1997.<sup>55</sup> For example, establishing specialised anti-corruption agencies to fight corruption and guarantee the independence of specialised anti-corruption authorities. Also, the introduction of rules and codes of conduct that were aimed at preventing conflicts of interest for public authorities whose activities are subject to private-sector interests, ensuring freedom of the media, and freedom of information.<sup>56</sup> Furthermore, the EU Commission developed the concept of corruption at EU level in 2003 and defined it as an abuse of power for private gain.<sup>57</sup>

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<sup>50</sup>Schmidt-Pfister, D and H. Moroff (2013), *Fighting Corruption in Eastern Europe: A Multilevel Perspective*, New York: Routledge, pp. 104-105.

<sup>51</sup>Rogowski, R. (2010), ALACs and the Concept of Citizen Participation in the Light of European Law (October 25, 2010 Warwick School of Law Research Paper No. 2010/25.

<sup>52</sup>European Commission (2003), Communication on Comprehensive EU Policy Against Corruption', COM(2003) 317 final.

<sup>53</sup>Beblavý, M. and E.B. Sičáková (2014), 'The Changing Faces of Europeanisation: How Did the European Union Influence Corruption in Slovakia Before and After Accession?', *Europe-Asia Studies*, **66**(4), pp. 536-556.

<sup>54</sup>Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 7.

<sup>55</sup>European Commission (2003), Communication on Comprehensive EU Policy Against Corruption', COM(2003) 317 final.

<sup>56</sup>European Commission (2002), Report on the Stabilisation and Association Process for South East Europe. First Annual Report', COM (2002) 163 final.

<sup>57</sup>European Commission (2003), Communication on Comprehensive EU Policy Against Corruption', COM(2003) 317 final.

Thus, the EU in 2003 also embraced both the public and private sectors with this definition.

In defining corruption for the purposes of EU policy, the EU Commission defined a distinction between a narrow criminal law definition and a broader notion of corruption used for purposes of preventive policy.<sup>58</sup> The distinction between the criminal law definition and the broader concept of corruption adopted for the purposes of preventing it is important. This is because criminal law definitions constitute a basis for prosecuting offenders and thus must be unambiguous and specific. The clarity of definition is preserved against the discretionary power of public authorities. As a result, EU criminal law recognises only discrete corrupt practices, such as taking or offering bribes, and fails to cover the full range of corrupt activities.<sup>59</sup> Bribery is simply one type of corruption, there are many others, such as buying votes, favouritism, nepotism, trading in influence and illegal political party financing.<sup>60</sup>

As highlighted above, the EU Commission's anti-corruption policy changed during the pre-accession stage because of different events in the EU; in particular, the high level of corruption in the Central and Eastern European states. The policy first changed because new legal instruments were adopted at international level. Secondly, in parallel to the incremental changes of the Copenhagen criteria in which the EU Commission established specific criteria for the Candidate States, the EU Commission learnt to also address similar issues towards the Member States. From 2003, the EU Commission started to encourage Member States to join GRECO and other international agreements.

This shift of attitudes by the EU Commission showed that the EU policy against corruption developed further in preparation for the 2004

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<sup>58</sup> Carver, J. (2003), 'Combating Corruption: The Emergence of New International Law', *International Law Forum*, 5(2), pp.119–123.

<sup>59</sup> Carver, J. (2003), 'Combating Corruption: The Emergence of New International Law', *International Law Forum*, 5(2), pp.119–123.

<sup>60</sup> Stachowicz, S. A. (2010), *Organizational Immunity to Corruption: Building Theoretical and Research Foundations*, Charlotte, NC; Information Age Publishing, INC, pp. 135.

enlargement. The Candidate States were under strong political pressure to comply with the EU Commission's recommendations set out in the Regular Reports and the EU had legal leverage to push for anti-corruption reforms in the countries that acceded to the European Union in 2004.

The instruments established in the enlargement policy did not have a more decisive impact in this context, but rather proposed a platform for improvement in policy against corruption. Furthermore, to the inclusion of corruption as a serious crime into a number of instruments of criminal law, such as the European Arrest Warrant and money laundering, the most related development was the increased cooperation between different Directorate Generals inner the Commission.

The Communication also highlighted the exceptional role of GRECO, as in a new section it went further than the narrow focus on criminal law, or in the words of a Commission official *'we will be looking at - I guess the jargon is 'mainstreaming'—and mainstreaming, thinking about corruption in a whole lot of other areas'*.<sup>61</sup> An example of this is the checklist annexed to the 2003 Communication that highlighted the specific standards of evaluating a state's legal and implantation apparatus. According to official form Commission; *"It is a handy checklist for our colleagues, particularly in the external relations area, in the area of development aid . . . these are the areas, they will never be specialist on corruption, but if they have a quick checklist of what are the things that are signals that things are going well, or that things are potentially going to go badly"*<sup>62</sup>.

Following along such lines, the connections between different services in the EU Commission were reinforced and strengthened over the last few years for the purpose of improving the consistency in consensual agreements between the EU, Candidate, and Potential Candidate states. Furthermore, the Council raised awareness of anti-corruption regulations in

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<sup>61</sup> Grzymala-Busse, A. and A. Innes (2003), 'Great Expectations: The EU and Domestic Political Competition in East Central Europe'. *East European Politics and Societies*, 17(1), pp. 64- 73.

<sup>62</sup> Grzymala-Busse, A. and A. Innes (2003), 'Great Expectations: The EU and Domestic Political Competition in East Central Europe'. *East European Politics and Societies*, 17(1), pp. 64- 73.

the EU's external relations and supported the EU Commission's external competences by making the fight against corruption one of the key objectives of the European Neighbourhood Policy.<sup>63</sup>

In the same approach for future enlargements, certain changes were introduced and thus opened up a new set of conditionality, such was the case for Bulgaria and Romania. On the one hand, the ratification of the United Nations Convention against Transnational Organized Crime (UNTOC) and United Nations Convention against Corruption (UNCAC) by most EU Member States meant that these conventions were also considered in the monitoring process of Candidate States. On the other hand, anti-corruption moved from chapter 24 to the new chapter 23 of the European Neighbourhood acquis, which placed the judiciary, and fighting against corruption and organized crime higher on the agenda. This shift of priorities significantly reinforced the leverage on anti-corruption policy also in the current structure for EU policy in Candidate and Potential Candidate states.<sup>64</sup>

Although the Commission in its enlargement policy strengthened anti-corruption policy, competences in addressing anti-corruption policy in the Member States were still limited. The only significant transformation at this time was that the Commission started to make improvements in approaching crime throughout the development of comparable statistics. Not least it started to collect a comparable and inclusive summary on all EU Member States within the boundaries of its competences at the time. Also, the EU Commission went beyond its statistics on corruption, by also using the Transparency International Corruption Perception Index, thus engaging with civil society in identifying corruption in the EU member states. This progress of the EU Commission to use these comparable statistical data was an effort to regulate the EU's low awareness about corruption in the

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<sup>63</sup> Poli, S. (2016), *The European Neighbourhood Policy - Values and Principles*. London and New York: Routledge, p. 90.

<sup>64</sup> Poli, S. (2016), *The European Neighbourhood Policy - Values and Principles*. London and New York: Routledge, p. 90.

Member States.<sup>65</sup>

According to an EU official, data statistics were used to reduce the gap of ‘*how much we watch and know in the member states as opposed to the countries that are acceding. This will help ourselves and the member states to be actually a bit clearer on what is going on across a whole range of crime areas, not just corruption*’.<sup>66</sup> As highlighted in the Council’s draft document *European Policy Needs for Data on Crime and Criminal Justice; State of Play*, the Commission’s initiatives on producing comparative statistics were met by constant disagreement between Member States. The limited support for relying on soft law underlined the argument that, in contrast to other policy areas such as administrative cooperation and collaboration, the EU Member States were clearly reluctant to build up a unified framework in the area of anti-corruption policy. These challenges undermined also the influence of Commission initiatives in areas such as comparative statistics, which also as a result lacked the efficiency for as long as the Member States do not comply with it.<sup>67</sup>

EU anti-corruption as a policy field up to this point was characterised largely by fragmentation and the lack of a strategic vision on how to fight corruption collectively. Though the Regular Reports on the Central and Eastern Europe States did offer an adequate set of anti-corruption standards, these countries failed to apply them consistently. The biggest weakness of EU policy was the fact that it ended on the day of accession of the CEE countries to the EU, which was in May 2004.<sup>68</sup> Although the problems with corruption remained serious in these countries, the EU lost its influence to drive reforms in the CEE countries at that point. Even so, the EU accession process had a significant impact on the legal and institutional framework

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<sup>65</sup> Linnan, K.D. (2012), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered*. London and New York: Routledge, p. 15.

<sup>66</sup> Grzymala-Busse, A. and A. Innes (2003), ‘Great Expectations: The EU and Domestic Political Competition in East Central Europe’. *East European Politics and Societies*, 17(1), pp. 64- 73.

<sup>67</sup> Council of the European Union (2006), ‘Regulation on establishing an Instrument for Pre-Accession Assistance (IPA)’ (EC) No 1085/2006, Official Journal of the European Union Vol. L 210/82: 31.

<sup>68</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 21.



that was heavily involved in addressing corruption. The pressure by the EU Commission led to major legislative changes, in particular in the areas of public procurement legislation, criminal and civil procedure, anti-corruption legislation, and civil service legal frameworks. The EU approach in the area of application of criminal law led also to major changes in Candidate States. For example, it improved the coordination between law enforcement agencies, education of law enforcement officials and EU-assisted reform of the judiciary. The progress accomplished in the Czech Republic in improving the effectiveness of enforcement agencies and the courts in fighting corruption was possible due to EU assistance.<sup>69</sup>

However, EU assistance was not as successful as in the case of the Czech Republic in the cases of Poland and Romania in particular.<sup>70</sup> The influence of the EU Commission in developing anti-corruption policy in the Candidate States was rather limited and fairly inadequate for a number of reasons at the time. Firstly, as shown above, the EU itself lacked a generally based anti-corruption framework. Secondly, the successes of EU Commission in encouraging on a regular basis Candidate States and Member States was limited because Governments had not always shown the will to implement the anti-corruption initiatives that the EU was pushing. Nevertheless, this might be possibly inevitable in the area of anti-corruption policy, because the EU Commission clearly did not want to risk facing an open battle with corrupt Governments in some cases.<sup>71</sup> Thirdly, in a number of policy areas, the EU standards that existed at the time were mainly focused on preventing corruption. An example was the objective of the EU Commission directives on public procurement to support a single market in procurement, and the anti-corruption effects of procurement legislation are secondary.<sup>72</sup> On a similar note, the pressure

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<sup>69</sup> Bailey, D. and Propris, L. (2004), 'A Bridge Too Phare? EU Pre-Accession Aid and Capacity- Building in the Candidate Countries', *Journal of Common Market Studies*, **42**(1), pp. 77- 98.

<sup>70</sup> Yesilada, B. and D. Wood (2016), *The Emerging European Union*. 5<sup>th</sup> Edition, London and New York: Routledge, p. 73.

<sup>71</sup> Copeland, P. (2014), 'Central and Eastern Europe: Negotiating Influence in an Enlarged European Union', *Europe-Asia Studies*, **66**(3), pp. 467-487.

<sup>72</sup> Vrancianu, A. (2014), 'Modification of a Public Procurement Contract under the New European Directives on Public Procurement', *Business Law Journal*, **3**(1), pp. 161-163

applied by the EU Commission on Candidate States to carry out civil service reforms is not inspired mainly by a will to fight corruption, but by the need to enhance a specialised public administration that is capable of implementing the full Copenhagen acquis.

In itself, the EU Commission directives border context is a good objective, because corruption is not the most important problem facing public administrations in the EU and this fact was taken seriously when designing reforms. However, this highlighted the importance of understanding the positive aspects of these reforms for Candidate States, rather than looking at it as a demand by the EU. As a result, the EU came to the conclusion that the best way to fight corruption was not always to address corruption specifically in a policy context, but to pursue other primary policy objects whose fulfilments prevent corruption as a side effect.<sup>73</sup>

However, the EU Commission methods in practice, when supporting Candidate States for developing their own anti-corruption policy, have not always been as organised in PHARE projects related to anti-corruption policy that are established on an ad hoc basis, frequently relying on consultancy contracts with private firms. There is no centralised pool of resources and official EU expertise, nor any system of twinning or secondment organised on a regular and strategic basis at this time for the Candidate States.<sup>74</sup>

In summary, the approach of the EU Commission to address corruption in the CEE States was not always effective in supporting them to develop a successful anti-corruption policy that addressed the actual problems that exist with corruption. Also, it was not made sufficiently clear to the CEE States what key benchmarks they must meet or were supposed to achieve in terms of anti-corruption policy in order to directly satisfy the accession

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<sup>73</sup> Noutcheva, G. (2012) *European Foreign Policy and the Challenges of Balkan Accession, Conditionality, legitimacy and compliance*. London and New York: Routledge, pp. 83-85.

<sup>74</sup> Noutcheva, G. (2012) *European Foreign Policy and the Challenges of Balkan Accession, Conditionality, legitimacy and compliance*. London and New York: Routledge, p. 83-85.

criteria set in the Copenhagen acquis.<sup>75</sup>

The CEE states accession wave heightened concerns that the EU itself lacked a coherent anti-corruption policy. The policy at the time was limited to conventions that were general and were not ratified by a number of Member States.<sup>76</sup> The mandate of the EU Commission to address the issues of corruption in the CEE States was rather weak and the EU Commission did not have a mandate to impose anti-corruption reforms on existing Member States. Although the Copenhagen acquis expired once Candidates joined the European Union, the fact is that the issue of corruption remained a serious issue for concern in most of the CEE States that joined the EU in 2004. Such a position left the EU to assess its own efforts and to focus attention on tackling corruption through clarified benchmarks and strengthening its monitoring mechanisms for the future Candidate countries. The acknowledgment of such shortcomings to address corruption by the EU made the Commission change strategy during the accession of Bulgaria and Romania.<sup>77</sup> The anti-corruption strategy used for the CEE countries that acceded the EU in 2004 was no longer deemed to be adequate and clearly lacked sufficient anti-corruption standards in addressing the high levels of corruption in Bulgaria and Romania.<sup>78</sup> As a result of this reflection and understanding, on 13<sup>th</sup> December 2006 the Commission adopted a decision on the basis of Articles 37 and 38 of the Treaty of Accession, in which it established the *Co-operation and Verification Mechanism* for Bulgaria<sup>79</sup> and Romania.<sup>80</sup> This was the first time that such

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<sup>75</sup> Van Elsuwege, P. and R. Petrov (2014), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union; Towards a Common Regulatory Space?*. London and New York: Routledge, p. 38-41.

<sup>76</sup> Soeren. K. and A. Zeynep (2015), *The EU and Member State Building: European Foreign Policy in the Western Balkans*. London and New York: Routledge, pp. 41 – 49.

<sup>77</sup> Noutcheva, G. (2012) *European Foreign Policy and the Challenges of Balkan Accession, Conditionality, legitimacy and compliance*. London and New York: Routledge, p. 84. .

<sup>78</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press, pp. 245.

<sup>79</sup> European Commission (2006), Decision on establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, (2006/929/EC) OJ L 354/58, 14.12.2006.

a monitoring mechanism was used in post-accession in the history of EU policies. The establishment of the CVM opened up a second generation of conditionality and it marked the beginning of the fourth phase of the EU anti-corruption policy as a policy field.<sup>81</sup>

#### **1.4 Fourth phase**

The EU enlargement in 2004 made the EU Commission go beyond its single market objectives and focus also on promoting the proper functioning of democracy and the rule of law. The fight against corruption was understood at this time as a key objective to enhance the rule of law and democracy, but less significant than the economic and administrative adjustments that guaranteed the proper functioning of the single market after the accession of the CEE states to the European Union. After the accession of the CEE states in 2004, corruption was acknowledged by the EU Commission as a serious problem and the EU wanted to avoid a similar mistake made with the CEE states in the case of Bulgaria and Romania. As a result, the EU decided to reinforce its EU enlargement policy towards Bulgaria and Romania.<sup>82</sup>

The Treaty of Accession with CEE states implemented three specific safeguard clauses in relation to the economy, the internal market and the area of JHA, which can be enforced for three years after accession and thus it ended in 2007. Thus, any new or old EU Member State had leverage to invoke an economic clause in case of any serious economic crises as a result from accession.<sup>83</sup> The internal market clause could be invoked when a new Member State created or risked causing a serious violation of the functioning of the internal market. The EU Commission can then take some

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<sup>80</sup> European Commission (2006), Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, (2006/928/EC) OJ L 354/56, 14.12.2006.A.H.E.

<sup>81</sup> Coman, R (2014), 'The Normative Power of the EU and Contentious Europeanization: The Case of Judicial Politics', *Journal of European Integration*, **36**(6), pp. 533-548.

<sup>82</sup> Soeren. K. and A. Zeynep (2015), *The EU and Member State Building: European Foreign Policy in the Western Balkans*. London and New York: Routledge, pp. 41 – 49.

<sup>83</sup> Chiva, C. and D. Phinnemore (2012), *The European Union's 2007 Enlargement*, London and New York: Routledge, pp. 12 – 14.

measurements, for example excluding States from benefiting from specific internal market legislation. Also, the JHA safeguarding measurements allowed the old Member States to have power to reject any application of judgments and arrest warrants from the CEE states in case of forthcoming risks in the implementation and application of the *acquis* that concerned the mutual recognition in civil and criminal cases.<sup>84</sup>

The widespread corruption was seen as potentially damaging the appropriate implementation of the *acquis* in the CEE states and thus could also have a damaging effect in the independence and impartiality of the justice system, which is a key prerequisite for the implementation of the principle of mutual recognition. One could argue that it would appear that the high levels of corruption in the CEE states would potentially activate the application of the JHA clause. All the same, this was not the case in the end and the JHA clause was unlikely to be used to punish the CEE states concerning their anti-corruption strategies and policies also in the case of Bulgaria and Romania. As highlighted above, the safeguard clauses were an emergency break instrument for possibly invoking them, but in the end it was never used.

Thus, the EU saw an alternative in the case of accession of Bulgaria and Romania in January 2007. Both states applied for EU membership in 1995 and until 2005 were subject to the same EU accession policy as the CEE states that joined the EU in 2004. However, in 2005, when the Treaty of Accession with Bulgaria and Romania was signed, one could observe a shift in the EU Commission's strategy and corruption as a central theme and issue for both states. The EU Commission started to monitor Bulgaria and Romania more strongly than the 2004 entrants. This is because it also involved some more practical reasons for this change of policy. Firstly, it was easier to monitor only two countries and the issue of corruption was

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<sup>84</sup> Chiva, C. and D. Phinnemore (2012), *The European Union's 2007 Enlargement*, London and New York: Routledge, pp. 12 – 14.

more widespread in the public administration in Bulgaria and Romania.<sup>85</sup>

There were also other reasons that led to a more different approach by the EU Commission in Bulgaria and Romania, mainly because of the political climate within the EU. The refusal of the Constitutional Treaty in the Dutch and French referendums showed a public disapproval of various aspects of EU policy, including that of EU enlargement policy. In a more difficult political climate, the EU Commission was under pressure to show a stronger approach that there was a tougher commitment to address corruption in Bulgaria and Romania more thoroughly in comparison to the CEE states in 2004. Furthermore, the EU also learned from the previous EU enlargement and acknowledged that it is essential to implement effective monitoring instruments to ensure that the implementation of anti-corruption policy is effective and can have an impact.<sup>86</sup> As a consequence, the EU policy towards Bulgaria and Romania was reinforced in two ways. Firstly, by introducing a sanction option of postponing accession; secondly, by introducing the Cooperation and Verification Mechanism to monitor progress in the area of anti-corruption after the accession process was finished in Bulgaria and Romania.<sup>87</sup>

The different policy approach of the EU towards Bulgaria and Romania was not the result of different governance standards, but was more a matter of political will of their governments to tackle the issues concerning corruption more effectively. In Adam Łazowski's account, the postponement clause was a 'stick to discipline the forthcoming Member States in their last minute pre-accession efforts'.<sup>88</sup>

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<sup>85</sup> Trauner, F. (2009), 'Post-accession compliance with EU law in Bulgaria and Romania: A comparative perspective', *European Integration Online Papers (EIoP)*, Special Issue 2(13), Art. 21, <http://eiop.or.at/eiop/texte/2009-021a.htm>

<sup>86</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press, p. 227.

<sup>87</sup> Carp, R. (2014), 'The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism', *Utrecht Law Review*, 10(1), pp. 1-16.

<sup>88</sup> Łazowski, A. (2007), 'And Then They Were Twenty-Seven ... A Legal Appraisal of the Sixth Accession Treaty', *Common Market Law Review*, 44(2), pp. 401-430.

In addition to the postponement clause, Bulgaria and Romania were also presented with a list of specific anti-corruption commitments to be followed after the accession negotiations were concluded. In the 2004 enlargement, only Poland was presented with one special recommendation to introduce the liability of legal persons for corruption. By contrast, the list issued towards Bulgaria and Romania showed that the EU Commission took a tougher policy stance towards addressing corruption in the 2007 enlargement. The EU acknowledged the risks involving corruption, but still on political grounds decided not to postpone the accession of Bulgaria and Romania. This was even though the two countries did not complete the EU membership criteria. According to Noutcheva, the EU fell into ‘its own trap and there was no easy way out’.<sup>89</sup> The EU could not postpone the accession of Bulgaria and Romania on the one hand without losing its integrity and credibility; on the other hand, the accession of Bulgaria and Romania with high levels of corruption and inadequate frameworks to fight organised crime was going to have a severe effect in the functioning of the EU.<sup>90</sup>

Thus, the EU opted for a solution to establish a post-accession monitoring system, which no previous EU Member State had ever faced before. As a result, Bulgaria and Romania were allowed to join the EU under the condition that they had to meet certain anti-corruption benchmarks after their accession into the European Union. Benchmarking is definite as a system that targets at comparing in a structured approach organisational procedures and performances with the aim of improving these procedures, and subsequently forming new and higher standards.<sup>91</sup> It was used in the pre-accession process mainly. Nevertheless, the anti-corruption benchmarks were ambiguous and not systematically implemented throughout the EU candidate states. The new monitoring mechanism gave the EU Commission

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<sup>89</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press, p. 226..

<sup>90</sup> Chiva, C. and D. Phinnemore (2012), *The European Union's 2007 Enlargement*, London and New York: Routledge, pp. 13 – 16.

<sup>91</sup> Ramalho, A. (2016), *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization*. Switzerland: Springer pp. 216 – 217.



some leverage to maintain pressure on Bulgaria and Romania in establishing effective anti-corruption reforms. It was observed that the EU acted on the notion that it might be better to work with Bulgaria and Romania once they are inside the EU, rather than to try to push for reforms from outside of the EU and lose the EU enlargement momentum.<sup>92</sup>

This new approach by the EU did not only extend the application of pre-accession monitoring instruments, but also improved the EU enlargement policy. As shown above, the greatest shortcomings of the EU policy towards the CEE states was that it lacked coherent and clear anti-corruption benchmarks. In December 2006, the EU Commission implemented a decision on the basis of Articles 37 and 38 of the Treaty of Accession to establish the Cooperation and Verification Mechanism to evaluate and monitor the progress in implementing benchmarks in the area of judicial reform and the fight against corruption in Bulgaria and Romania. Articles 37 and 38 of the Treaty of Accession included similar internal markets and JHA safeguarding measurements as the ones used for the 2004 enlargement. If Bulgaria and Romania failed to implement these benchmarks, the EU Commission had the power to apply these safeguarding measurements. The main difference with the previous round of enlargement was that the insufficient efforts to fight corruption could lead to the postponement of other EU Member States' duty to recognise rulings and execute warrants issued by Bulgaria and Romania's courts, and prosecutors could fail under the principle of mutual recognition. The safeguarding measurements gave the EU Commission the power to invoke up to three years after their accession.<sup>93</sup>

The benchmarks designed for Bulgaria and Romania form the EU Commission in context supported for fundamental reforms. These benchmarks suggest that both Bulgaria and Romania fulfilled the principal membership condition of having an independent and effective judicial

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<sup>92</sup> Chiva, C. and D. Phinnemore (2012), *The European Union's 2007 Enlargement*, London and New York: Routledge, pp. 1 – 3.

<sup>93</sup> Gateva, E. (2015), *European Union Enlargement Conditionality*. New York: Palgrave Macmillan, pp. 102.



system, which is central for implementation of the *acquis*. Bulgaria and Romania were required to submit reports on their progress in meeting these benchmarks by the end of March of each year. The EU Commission, also on the basis of the national reports and its own findings, issued its own report every six months, which was also communicated to the European Parliament and the Council.

The monitoring instrument under the Cooperation and Verification Mechanism, as a post-accession monitoring system, is very different from the pre-accession strategy. It contains meeting specific policy goals for Bulgaria and Romania on the basis of setting up specific anti-corruption benchmarks, periodical monitoring of compliance with the benchmarks using independent sources of information and providing the financial and technical assistance to support anti-corruption reforms. This procedure of benchmarking is similar to the Council of Europe's GRECO evaluations of the Twenty Guiding Principles against Corruption. However, the CVM reports cover more detailed evaluations than any other pre-accession instruments. It shows that the EU understood that the anti-corruption policy established for the purpose of the 2004 enlargement policy was inadequate and insufficient.<sup>94</sup>

The EU, by establishing the CVM, clearly responded to the problematic issue of corruption in Bulgaria and Romania and took it more seriously than in the previous round of enlargement. The EU policy against corruption also became more systematic, not only because new Member States were asked to achieve better anti-corruption policy actions, but also the EU developed clearer and more coherent anti-corruption guidelines. It is observed that the imposition of this monitoring system can be interpreted as an admission that the accession process has failed to ensure they meet EU standards.<sup>95</sup> The former Romanian justice minister, Monica Macovei, endorsed the CVM as a post-accession monitoring instrument, because she

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<sup>94</sup> Grabbe, H. (2002), 'European Union Conditionality and the "Acquis Communautaire"', *International Political Science Review*, **23**(3), pp. 249-68.

<sup>95</sup> Cierco, T. (2013), *The European Union Neighbourhood: Challenges and Opportunities*. London and New York: Routledge, pp. 25 – 26.

believed that the reforms of the judiciary and the fight against corruption must continue even after Romania joined the EU.<sup>96</sup>

However, some argue that the Cooperation and Verification Mechanism has not always been as effective. The monitoring procedures were criticised by France, the Netherlands, Sweden and the United Kingdom, which all stated that the EU Commission was not taking the work seriously enough. The former EU Commissioner Frattini, who was in charge of assessing the progress of Bulgaria and Romania, was accused of getting too close to the governments he was supposed to be inspecting, which included going on a skiing trip with the Bulgarian interior minister. In the Economist's observation, there was a shared view that Bulgaria and Romania joined the EU too soon and, since they joined the EU, they have sided away from implementing crucial reforms since accession.<sup>97</sup>

The post-accession monitoring instrument is more comprehensive, given that the effectiveness of the CVM depended largely on the application of sanctions, which was limited for political motives. Most of the efforts undertaken by Bulgaria and Romania since the accession were superficial, and the EU Commission did not propose to invoke the safeguarding clauses given by the Treaty of Accession. The EU Commission believed that sanctions were not deemed necessary and appropriate at that point; it stated that safeguards are not punitive measurements to take in case of non-delivery – but are measurements of last resort in order to safeguard the welfare and interests of the European Union.<sup>98</sup>

The context of the CVM reports was subject to political pressure from the EU Commission. The Commissioner responsible for JHA at the time, Mr Frattini, recommended introducing modifications to the context of the CVM

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<sup>96</sup> Hipper, M. A (2015), *Beyond the Rhetorics of Compliance: Judicial Reform in Romania*. Freiburg: Springer VS, pp. 221-222.

<sup>97</sup> Economist, (2007), 'Post-enlargement stress: Support for European Union expansion is under new threat, *The Economist*. 8<sup>th</sup> Nov 2007, [Online], Retrieved from; <http://www.economist.com/node/10097850>

<sup>98</sup> Chiva, C. and D. Phinnemore (2012), *The European Union's 2007 Enlargement*, London and New York: Routledge, p. 16.

reports, stating that ‘critical remarks are too strong and should be toned down. Under pressure from Bulgaria and Romania Commissioners, the words ‘no room for complacency’ in pursuing reforms and fighting corruption were changed into a more diplomatic format that ‘there is need to step up efforts’. Franco Frattini defended this amendment by saying that it was important to choose ‘appropriate language’.<sup>99</sup>

It appears that the CVM as a mechanism relied more on peer pressure rather than the threat of using the safeguarding clauses. One can argue that any forms of pressure for reform might have been more effective if used before accession, when the EU influence over the national policies of Bulgaria and Romania was much stronger. However, the monitoring instrument was designed to keep the political pressure up. The EU Commission came under some pressure from Member States, which insisted on taking more serious steps towards Bulgaria and Romania. A Dutch EU affairs minister at the time asked the EU Commission in June 2009 to activate the clauses if the progress in judicial reform turned out to be inadequate again. Furthermore, a group of Member States, including the United Kingdom, France and the Netherlands in 2008, asked for the postponement of Bulgaria’s and Romania’s participation in Schengen due to their insufficient anti-corruption reforms.<sup>100</sup>

In summary, the CVM offers only a provisional ground to push Bulgaria and Romania for anti-corruption Reform, but it did not solve the problem in the long term. The EU decided to establish the CVM in acknowledgment that its structure was not able to offer a sufficient solution in the long term and a better solution would be to establish an anti-corruption instrument that evaluated all Member States on an equal basis, which would remove the disagreement of applying double criteria within Member States. The 2004 and 2007 enlargements presented a number of lessons, which are now

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<sup>99</sup> Goldirova, R. (2007), Frattini defends mild stance on Bulgaria and Romania. *The EU Observer*, 27 June 2007 [Online], Retrieved from; <https://euobserver.com/enlargement/24374>

<sup>100</sup> Mason-Szarek, P. (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press, p. 227.

being integrated into the pre-accession strategy towards the current Candidate States. In any future enlargement, the timescale for accession is likely to be longer and more rigorous in addressing anti-corruption shortcomings, as the case study for Albania will show in Chapter 4.

The EU anti-corruption policy, as a policy field, developed further in 2010 with the establishment of the Stockholm Programme, which sets out key priorities for the EU in the areas of justice, freedom and security for the period 2010-14. It aimed at addressing key challenges in the areas of justice, freedom and security and it also included addressing corruption.<sup>101</sup> With the adoption of the Stockholm Programme, the EU Commission had a political mandate to evaluate efforts in the fight against corruption and developed further its anti-corruption policy, in close co-operation with the Council of Europe Group of States against Corruption.<sup>102</sup>

Subsequently after the Lisbon Treaty, the legal grounds for more efficient instruments to fight corruption were consolidated and efforts to support better anti-corruption policy were taken. By abolishing the pillar structure, the Treaty permitted for an effective decision-making procedure and better implementation by the Member States of the actions in areas of Freedom, Security and Justice, while making them subject to better parliamentary and judicial control, in order to enhance more the balance between judicial and security safeguarding of citizens.<sup>103</sup> Article 83 TFEU classified corruption among the serious crimes with a cross-border dimension for which minimum rules on the definition of criminal offences and sanctions might be established. *Furthermore, with the 'Stockholm Program: An open and secure Europe serving and protecting the citizen'*<sup>104</sup> the European Council

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<sup>101</sup> Ball, R. (2014), *The Legitimacy of The European Union Through Legal Rationality: Free Movement of Third Country Nationals*. London and New York: Routledge, pp. 217 – 218.

<sup>102</sup> Rogowski, R. (2010), ALACs and the Concept of Citizen Participation in the Light of European Law (October 25, 2010 Warwick School of Law Research Paper No. 2010/25.

<sup>103</sup> Dawson, M. (2011), *New Governance and the Transformation of European Law: Coordinating EU*. Cambridge: Cambridge University Press, p. 99.

<sup>104</sup> Council of European Union (2009), The Stockholm Programme – An open and secure Europe serving and protecting the citizens. Adopted by the European Council on 10–11 December 2009, 17024/09.

encouraged the European Commission to develop further effective indicators for assessing efforts in the fight against corruption, specifically in the areas of the acquis. For example, public procurement, financial control and the establishment of a coherent anti-corruption policy. Afterwards, the European Parliament on numerous occasions requested for a comprehensive anti-corruption policy and the establishment of clear mechanisms monitoring the situation in the EU Member States on a more regular basis.

It is within this context that the EU Commission decided to set up an EU Anti-Corruption Report. Thus, in June 2011, the EU Commission implemented the EU Anti-Corruption Report in order ‘to address more robustly the serious damage that corruption causes to EU – economically, socially and politically’.<sup>105</sup> The new EU Anti-Corruption Report was communicated to be a set of measurements for addressing corruption also within the EU institutions. It consists of a Communication on the fight against corruption in the EU that is known as<sup>106</sup> a Commission Decision establishing an EU Anti-Corruption Report for building and implementing more effective policies against corruption at the EU and national levels.<sup>107</sup> The publication of objective fact-based reports that the EU Anti-Corruption Report would present would be applicable to all of the EU Member States. Thus, they would offer a more inclusive overview of the existence and efficiency of the anti-corruption efforts in the EU. A group of experts<sup>108</sup> and a network of researchers was set up to assist the Commission in its preparation.<sup>109</sup>

Furthermore, the new EU Anti-Corruption Report was building on existing tools in terms of evaluating anti-corruption policies and aimed at adding

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<sup>105</sup> European Commission (2011), Communication on Fighting Corruption in the EU, COM (2011) 308 final. .

<sup>106</sup> European Commission (2011), Communication on Fighting Corruption in the EU, COM (2011) 308 final.

<sup>107</sup> Taseva, E. (2012), ‘New European Commission anti-Corruption Package: Towards a More Efficient Fight against Corruption’, *The New Journal of European Criminal Law*, 3(3-4 pp. 344 – 362.

<sup>108</sup> European Commission (2011), Decision on setting up the Group of Experts on Corruption. 28 September 2011, (2011/C 286/03)

<sup>109</sup> European Commission (2011), Communication on Fighting Corruption in the EU, COM (2011) 308 final.

innovative measurements in addressing anti-corruption policy shortcomings. The evaluation and recommendations that the new EU Anti-Corruption Report was added to serve to everyone including politicians, the public, the media, and practitioners as a useful tool to see the level of corruption and policy shortcomings throughout the EU. The EU Anti-Corruption Report was also designed to monitor and evaluate the Member States in addressing corruption and to stimulate political commitment in pushing for anti-corruption reform. Supported by a specialist group and a network of research correspondents, the Report will be managed by the EU Commission Home Affairs and be published every two years. The Report was designed to present a rational reflection of the achievements, commitments and vulnerabilities of all the Member States efforts in addressing corruption. The EU Anti-Corruption Report's main objective was to identify trends and weaknesses that were necessary to be addressed, as well as to encourage more peer learning and exchange of best practices in areas of anti-corruption policy.<sup>110</sup>

The new EU Commission, in its communication in 2011, stated that the EU Anti-Corruption Report would try to avoid any duplication with the existing mechanisms and instruments, and to fill their gaps with other available means. As a result, the EU Commission decided to collaborate with the existing monitoring and evaluation mechanisms, while involving other participants such as independent experts, researchers, Commission services and the European Anti-Fraud Office, Europol and Eurojust, the European Anti-Corruption Network, surveys and civil society. The Report was established on the basis of existing international instruments from the Council of Europe, UN, and OECD, while concentrating on the cross-cutting problems of particular concern at EU level, as well as certain issues specific to each of the Member States.

The EU Anti-Corruption Report embodies a reiterated effort by the EU to achieve a more clear anti-corruption policy in the EU external and internal

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<sup>110</sup> European Commission (2011), Communication on Fighting Corruption in the EU, COM (2011) 308 final.

policies in the area of addressing corruption, which was the initial objective of the EU Commission in the late 1990s. However, it still remains to be seen whether the EU Anti-Corruption Report would effectively contribute to achieving the goals set out by the EU. What is clear is that the EU has developed further its anti-corruption policy field and the EU Anti-Corruption Report marks the pivotal fourth phase of the EU anti-corruption policy as a separate anti-corruption policy field in the EU.

## Chapter 2

### 2 The EU Anti-Corruption Report

The EU Commission revealed its intention for the first time on 6 of June 2011 to set up a new mechanism, the EU Anti-Corruption Report that would monitor and evaluate Member States' efforts against corruption.<sup>111</sup> The Report broadly aimed at address corruption in areas related to economy, politics and social relate issues affected by corruption practices. The EU Commission also inspired through the Report to encourage more political engagement to enhance more comprehensive anti-corruption policy. Furthermore, the EU Commission designed the Report to support Member States in enforcing legislation and to implement fully their international commitments, as well as to improve the coherence of their anti-corruption policies and actions at lower level.

Carlos Closa and Dimitry Kochenov, explain the development of the EU Anti-Corruption Report was the EU Commission's direct response to the appeal by the Member States in the Stockholm Programme, to develop additional indicators on the basis of existing systems and common benchmarks that would ensure measuring anti-corruption efforts within the European Union on a regular basis.<sup>112</sup>

The EU Commission published the EU Anti-Corruption Report for the first time on the 3<sup>rd</sup> of February 2014.<sup>113</sup> The EU Anti-Corruption Report presented an analysis of corruption within each of the EU's Member States, the steps that they can take to prevent and combat corruption more effectively, and possible ways to enhance their tools to fight corruption. The EU Anti-Corruption Report aimed mainly to support the anti-corruption work in the EU Member States and improve the political

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<sup>111</sup> European Commission (2011), Communication on Fighting Corruption in the EU, COM (2011) 308 final.

<sup>112</sup> Closa, C and Kochenov, D (2016) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge: University of Cambridge, p. 286.

<sup>113</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final



commitment in address the issue of corruption, and to identify how the EU dimension can support EU Member States further in fighting corruption.

The establishment of the EU Anti-Corruption Report was based in the principle that there is no 'one-size-fits-all' solution to combat corruption in one or several of the EU Member States, but corruption is a major concern for all the EU Member States.<sup>114</sup> Through periodical evaluation and publication of objective fact-based reports, the Report aims at producing additional impetus for the Member States to address corruption more effectively, especially by implementing internationally recognised anti-corruption standards. The EU Anti-Corruption Report is applicable equally to all Member States that aims at encourage them to develop a framework for more effective anti-corruption measurements. Furthermore, the Report aimed at supporting Member States to identify causes of corruption and aimed at laying grounds for future EU policy actions against corruption. The EU Anti-Corruption Report also aimed to be as a crisis alert instrument in order to identify potential risks deriving from corruption that could develop into a more serious economical and political crisis.<sup>115</sup>

The EU Anti-Corruption Report<sup>116</sup> covers all of EU Member States and it has the following structure.

- a) The introduction of the EU Anti-Corruption Report, which presents the policy background and key objectives.
- b) Results of Eurobarometer surveys of 2013 on perceptions of corruption and experience of corruption in the EU Member States.
- c) Thematic chapter is focused in assessing public procurement. The EU views public procurement crucial part for the internal market and public procurement can be a source for corruption. The chapter covers corruption

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<sup>114</sup> European Commission (2011), Communication on Fighting Corruption in the EU, COM (2011) 308 final.

<sup>115</sup> European Commission (2011), Communication on Fighting Corruption in the EU, COM (2011) 308 final.

<sup>116</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

and anti-corruption measurements within national systems of public procurement.

- d) Annex on methodology, describing how the report was prepared as well as methodological choices and limitations that were encountered.
- e) The country chapters cover all of the Member States policy shortcomings. These chapters do not provide a comprehensive description of corruption-related concerns and anti-corruption legislations. The country chapters mainly highlight selected key shortcomings identified through the individual assessment of each country and offer general recommendations for each of the countries.

## **2.1 The objectives of the EU Anti-Corruption Report**

According to Jeremy Horder and Peter Alldridge the aim of the EU Anti-Corruption Report is to provide an analysis of corruption within the Member States and the steps that they can take to prevent, and fight corruption more effectively.<sup>117</sup> Furthermore, in Horder and Alldridge account the main objective of the Report is to launch a border debate involving the EU Commission, Member States, the European Parliament and other stakeholders to assist the anti-corruption work and to identify new methods in which the European dimension can support Member States to address corruption more successfully.<sup>118</sup>

The Member States have in place most of the necessary legal instruments and institutions to prevent and fight corruption. However, the results they deliver are not satisfactory across the EU according to the findings of the EU Anti-Corruption Report.<sup>119</sup> Anti-corruption laws are not always properly enforced, systemic problems of corruption are not addressed effectively, and the relevant anti-corruption institutions do not always have adequate capacity to enforce anti-corruption rules according to the EU Anti-

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<sup>117</sup> Horder, J and Alldridge, P. (2014), *Modern Bribery Law: Comparative Perspectives*. Cambridge: University of Cambridge, p. 185.

<sup>118</sup> Horder, J and Alldridge, P. (2014), *Modern Bribery Law: Comparative Perspectives*. Cambridge: University of Cambridge, p. 186.

<sup>119</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

Corruption Report. Promising intentions from Member States governments are still too distant from concrete action, and genuine political will to address corruption appears to be largely missing in many of Member States.

In line with international legal instruments, the EU Anti-Corruption Report defines corruption in a broad sense as any ‘abuse of power for private gain’.<sup>120</sup> It therefore covers specific acts of corruption and those measures that Member States take step to prevent or punish corrupt acts as defined by the law. It also mentions a range of areas and measurements in which impact on the risk of corruption occurring and on the capacity to control it.

The EU Anti-Corruption Report focuses on selected key issues of particular relevance to each Member State, as it will be described in the following section. It describes good practices as well as weaknesses and identifies steps in which will allow Member States to address corruption more effectively. The EU Commission recognises that some of these issues are exclusively to national competence. However, it is in the common interest of EU to ensure that all Member States have sufficient anti-corruption policies in place and that the EU supports Member States in pursuing developing sufficient anti-corruption policy. Thus, the main aim of the EU Anti-Corruption Report is to promote high anti-corruption standards across the Member States by highlighting shortcomings as well as good practices in the Member States.

The EU Anti-Corruption Report views corruption as a complex phenomenon that is entrenched in the economic, social, political and cultural dimensions, which cannot be easily eliminated only with the work of the Report.<sup>121</sup> Therefore, an effective policy response to the Report by Member States cannot be sufficient enough, as there is no ‘one size fits all’ solution for all the Member States. That is way the EU Anti-Corruption Report examines corruption within the national context of each Member State, and suggests recommendations that are more pressing for Member

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<sup>120</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>121</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

State need. Although, there is a wider policy objective why the EU Anti-Corruption Report was established.

According to Kemal Dervis and Jacques Mistral the global financial crisis in 2007 – 2008 put additional pressure on Europeans governments and the EU economic challenges required that European Union respond to promote higher integrity and transparency of public expenditure.<sup>122</sup> The Eurobarometer for the Report found that citizens expect the EU to play an important role in supporting Member States to protect their economy against organised crime, financial and tax fraud, money laundering and corruption, not least in times of budgetary austerity and economic crises.<sup>123</sup>

The Europe 2020, which is the EU's growth strategy over the present decade to foster a smart, sustainable and inclusive economy, therefore supporting the EU and its Member States to deliver high levels of employment, productivity and social cohesion.<sup>124</sup> The EU Anti-Corruption Report suggests that the success of the Europe 2020 strategy will also depend on institutional factors, such as the proper application of good governance, rule of law, and in particular the control of corruption.<sup>125</sup> Therefore, fighting corruption is viewed by the EU Anti-Corruption Report to contribute also to the EU's competitiveness in the global economy. Therefore, anti-corruption measurements have been highlighted in respect to a growing number of Member States as part of the European Semester, which is a yearly cycle of economic policy coordination involving a detailed analysis of Member States' programmes for economic and structural reform as well as country-specific recommendations. Broadly speaking, the EU Anti-Corruption understands that improving the efficiency of public administration, especially if combined with greater

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<sup>122</sup> Dervis, K and Mistral, J. (2016), *Europe's Crisis, Europe's Future*. Washington, D.C: The Brookings Institution, pp. 87– 88

<sup>123</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>124</sup> European Commission (2010), Communication on Europe 2020: A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 final

<sup>125</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

transparency, would help in mitigating corruption-related risks.<sup>126</sup> The Commission Communication for a European Industrial Renaissance in January 2014 as a result pays particular attention to quality of public administration as a driving aspect of the EU's growth strategy.<sup>127</sup> As a result the Report also sees itself as an instrument for promoting higher standards of integrity in the Member States.

## **2.2 Perceptions of corruption and experience of corruption in the EU**

In preparing the background of the EU Anti-Corruption Report, the EU Commission conducted two Eurobarometer surveys in early 2013. The first survey was the Special Eurobarometer<sup>128</sup> and the second was a business-focused 'Flash survey'.<sup>129</sup> The EU Commission also used the ranking of the CPI index used by Transparency International to evaluate the answers given by the Eurobarometer respondents for balancing the EU Anti-corruption Report.<sup>130</sup>

General responses to the Eurobarometer found that there was a positive perception and low experience of paying bribery in the Member States like Denmark, Finland, Luxembourg and Sweden.<sup>131</sup> Respondents in the surveys in these Member States hardly suggested that they had been asked to pay a bribe or engaged in a corruption act (less than 1 %) and the number of citizens who thought that corruption is widespread is 20 % in Denmark, 29 % in Finland, 42 % in Luxembourg, and 44 % in Sweden.<sup>132</sup> These numbers are considerably below the EU average. In the case of the UK, only 5 citizens out of 1115 were found to pay a bribe or engaged in corruption act

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<sup>126</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>127</sup> European Parliament (2014), "How can European industry contribute to growth and foster European competitiveness", *Study for the ITRE Committee*, August

<sup>128</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>129</sup> European Commission (2014), Flash Eurobarometer 374 on Business' Attitudes towards corruption in the EU, available on; [http://ec.europa.eu/public\\_opinion/flash/fl\\_374\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_374_en.pdf)

<sup>130</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>131</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>132</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

(less than 1 %), thus showing the best result in all of the EU. Nevertheless, the public perception data show that around 64 % of UK respondents that took part in the surveys think that corruption is widespread in the country.

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In Member States like Germany, the Netherlands, Belgium, Estonia and France, while more than half of the respondents that took part in the surveys consider corruption is a widespread phenomenon. Even though the actual number of citizens had to pay a bribe is lower than 2 % according to the citizens that took part in the surveys.<sup>134</sup> These Member States are also among the best performers in the Transparency International Index. Austria also shares similar characteristics with these Member States with the exception of a somewhat high number of respondents around 5 % who according to the citizens that took part in the surveys reported to have been expected to pay a bribe or engaged in a corruption act.<sup>135</sup>

In other Member States, Hungary (13 %), Slovakia (14 %) and Poland (15 %) there is relatively a higher number of citizens according to those that took part in the surveys that suggested that they had personal experience with bribery or engaged in corruption act in some number of sectors.<sup>136</sup> In these Member States, one sector, in particular the public healthcare system provided the bulk of instances of bribery. In these Member States there are evidences that the structural problems in the public healthcare system provide incentives to engage in bribery or corruption with medical staff for having access to better healthcare.<sup>137</sup> In Hungary, Slovakia and Poland, according the surveys showed that the public healthcare is the sector were citizens were frequently asked to pay a bribe.<sup>138</sup> While in other sectors such as police, customs, politicians, public prosecutors' services, were

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<sup>133</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>134</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>135</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>136</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>137</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>138</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

considered less than 1 % of respondents to engage in some form of corruption. Although, corruption in a broader sense is perceived as widespread in these Member States and the citizens respond was that they though corruption occurs broadly around 82 % in Poland, 89 % in Hungary and 90 % in Slovakia.<sup>139</sup>

In Member States like Portugal, Slovenia, Spain and Italy, bribery was perceived as rare but corruption in a broader sense is considered as a serious concern. In the surveys a relatively low number of respondents claimed that they were asked or expected to engage a corruption act in the last 12 months.<sup>140</sup> Whereas personal experience of bribery is was witness as rare with around 1-3 %. According to Alina Mungiu-Pippidi the perception is mainly influenced by recent political scandals and the economic crisis in these Member States in which reflects in the respondents' negative impression about corruption as an issue overall.<sup>141</sup> The surveys found that the general perception was that in corruption is widespread with 90% in Portugal, 91% in Slovenia, 95% in Spain and 97 % in Italy.<sup>142</sup>

Member States including Croatia, the Czech Republic, Lithuania, Bulgaria, Romania and Greece according to the surveys lagged more behind in the scores concerning both perceptions and actual experience of citizens engaged with corruption.<sup>143</sup> In these Member States between 6 % and 29 % of respondents that took part in the surveys indicated that they were asked or expected to engage in some form of corruption in the past 12 months.<sup>144</sup> Whereas, 84 % up to 99 % of citizens thought that corruption is widespread

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<sup>139</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>140</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>141</sup> Mungiu-Pippidi, A. (2015) *The Quest for Good Governance: How Societies Develop Control of Corruption*. Cambridge: University of Cambridge, pp. 161-185

<sup>142</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>143</sup> Börzel, Tanja A. (2014) 'Coming Together or Drifting Apart? Political Change in New Member States, Accession Candidates, and Eastern Neighbourhood Countries'. MAXCAP Working Paper Series, No. 03, May 2014, Maximizing the integration capacity of the European Union: Lessons of and prospects for enlargement and beyond" (MAXCAP ISSN 2198-7653

<sup>144</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

in their country.<sup>145</sup> In Member States like Croatia and the Czech Republic it appear that there is somewhat a more positive impression with slightly better scores than the rest of the countries from the same group.<sup>146</sup> Member States like Latvia, Malta, Ireland, and Cyprus do not show results that diverge as much from the EU average on any of these aspects shown above.

At European level, three quarters of respondents (76 %) think that corruption is widespread in their own country.<sup>147</sup> The Member States where respondents are most likely to think that corruption is extensively widespread are Greece with 99 %, Italy 97 %, Lithuania, Spain and the Czech Republic with 95 %. A quarter of Europeans (26 %), compared with 29 % showed by the 2011 Eurobarometer, considered that they are directly affected by corruption in their daily lives.<sup>148</sup> Citizens are most likely to say that they are directly affected by corruption in Spain and Greece (63 %), Cyprus and Romania (57 %) and Croatia (55 %).<sup>149</sup> The least likely citizens to think that they are directly affected by corruption are in Denmark (3 %), France and Germany (6 %). Around one in twelve Europeans or 8 % of EU citizens say according the surveys that they have experienced or witnessed a case of corruption in the past 12 months.<sup>150</sup> Respondents that took part in the surveys were most likely to say they have experienced or witnessed corruption personally in Lithuania with 25 %, Slovakia (21 %) and Poland (16 %).<sup>151</sup> The very least likely according to the respondents that took part in the surveys those were most likely to say they have experienced or witnessed corruption personally in Finland and Denmark with 3 % in each, Malta and the UK with 4 % in each.<sup>152</sup>

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<sup>145</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>146</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>147</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>148</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>149</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>150</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>151</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>152</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)



Around three quarters of Europeans or around 73 % considered that corruption and the use of personal connections is often the easiest path to get access to certain public services in their country.<sup>153</sup> In Member States like Slovakia and Croatia 89 % in each Cyprus with 92 %, and Greece with 93 % share this belief that corruption and personal connections is the quickest way to get access to public services.<sup>154</sup>

Similarly to 2011, around two in three Europeans or 67 % think the financing of political parties is not sufficiently transparent and properly supervised.<sup>155</sup> In Member States such as Spain with 87 %, Greece 86 %, and the Czech Republic 81 %, citizens have the view that that the financing of political parties are not adequately transparent and highly supervised.<sup>156</sup> Where as in Member States like Denmark 47 %, the UK 54 %, Sweden 55 % and Finland 56 %, citizens share similar views in respect o supervising and transparency of financing of political parties.<sup>157</sup> Around a quarter of Europeans or 23 % of EU citizens agree that their Government's efforts are sufficient in tackling and addressing the issue of corruption. Whereas around a quarter or 26 % of EU citizens think that there are adequate successful prosecutions in their country to deter people from bribery and corrupt practices.<sup>158</sup>

For the business-focused Flash survey the Member States results show a striking variations amongst them in the levels of perceived corruption. The highest Member States in the level of perceived corruption in business is Greece with 99 % and the lowest Denmark with 10 %. A similar result is also reflected in the 'Special Eurobarometer' presented above, between 20 % to 99 %.<sup>159</sup>

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<sup>153</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>154</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>155</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>156</sup> European Commission (2013), Special Eurobarometer 397 on Corruption, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_397\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf)

<sup>157</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>158</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>159</sup> European Commission (2014), Flash Eurobarometer 374 on Business' Attitudes towards corruption in the EU, available on; [http://ec.europa.eu/public\\_opinion/flash/fl\\_374\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_374_en.pdf)

At European level, more than 4 out of 10 companies consider corruption as an obstacle for doing business, and this is also the case for patronage and nepotism as well.<sup>160</sup> When asked directly whether corruption is a concern for doing business, 50 % of the construction sector and 33 % of the telecoms and IT companies thought that it was a problem to a serious degree.<sup>161</sup> The business-focused Flash survey found that the smaller the company was, the more often corruption and nepotism were as a problem for doing business. According to the business-focused Flash survey corruption in Member States such as Greece and Slovakia both 66 %, Portugal 68 %, Czech Republic 71 %, were most likely to considered corruption as a major problem when doing business by companies.<sup>162</sup>

## **2.3 Public Procurement**

According to the EU Anti-Corruption Report public procurement is an important element of the national economies in the EU and nearly one fifth of the EU's GDP is spent every year by public authorities in procuring works, goods and services.<sup>163</sup> An estimation by the EU Commission suggested that the total value of calls for tenders above those EU thresholds is as nearly as EUR 425 billion in 2011.<sup>164</sup> Thus, the EU Commission chose public procurement a thematic chapter for the EU Anti-Corruption Report to make Member States aware of the threat that corruption poses to public procurement.

A study in the EU Anti-Corruption Report based on identifying and reducing corruption in public procurement in the EU suggested that the

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<sup>160</sup> European Commission (2014), Flash Eurobarometer 374 on Business' Attitudes towards corruption in the EU, available on; [http://ec.europa.eu/public\\_opinion/flash/fl\\_374\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_374_en.pdf)

<sup>161</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>162</sup> European Commission (2014), Flash Eurobarometer 374 on Business' Attitudes towards corruption in the EU, available on; [http://ec.europa.eu/public\\_opinion/flash/fl\\_374\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_374_en.pdf)

<sup>163</sup> European Commission (2013), Flash Eurobarometer 398 on Internal Market Report, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_398\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf)

<sup>164</sup> European Commission (2013), Flash Eurobarometer 398 on Internal Market Report, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_398\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf)

overall direct costs of corruption in public procurement for key sectors including rail, road, water, waste, urban, utility construction, training, research and development in eight Member States, France, Italy, Hungary, Lithuania, Netherlands, Poland, Romania and Spain was between EUR 1.4 billion to EUR 2.2 billion.<sup>165</sup>

The flash Eurobarometer 2013 survey, used by the EU Anti-Corruption Report, found more than three out of ten, or around 32 % of companies in the Member States, participating in public procurement tenders, had reported that corruption had prevented them from winning a public contract.<sup>166</sup> This respond was widely shared amongst companies in the sectors such as construction with around 35 % and engineering with around 33 % overall in all of the Member States.<sup>167</sup> In Member States like Czech Republic with 51 %, Cyprus (55 %), Slovakia (57 %) and Bulgaria with 58 % company representatives suggested in the flash Eurobarometer 2013 survey that has been the case in these sectors.<sup>168</sup>

The flash Eurobarometer 2013 survey also found that the main reasons why companies have not taken part in a public procurement tendering process in the last three years is because of red tape with – around 21 % and criteria that appeared to be aimed for certain participants – around 16 %.<sup>169</sup> Furthermore, approximately four out of ten companies say that a variety of illegal practices in public procurement procedures are common, particularly specifications tailor-made for certain corporations – around 57 %, conflict of interest in bid assessment – around 54 %, collusive bidding around 52 %, unclear selection – around 51 %, involvement of bidders in setting up the specifications for tendering – around 48 %, violation of negotiated procedures – around 47 %, modifications to the procurement terms after

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<sup>165</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>166</sup> European Commission (2014), Flash Eurobarometer 374 on Business' Attitudes towards corruption in the EU, available on; [http://ec.europa.eu/public\\_opinion/flash/fl\\_374\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_374_en.pdf)

<sup>167</sup> European Commission (2013), Flash Eurobarometer 398 on Internal Market Report, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_398\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf)

<sup>168</sup> European Commission (2013), Flash Eurobarometer 398 on Internal Market Report, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_398\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf)

<sup>169</sup> European Commission (2013), Flash Eurobarometer 398 on Internal Market Report, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_398\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf)

conclusion of the public contract – around 44 %.<sup>170</sup> The flash Eurobarometer 2013 survey used by the EU Anti-Corruption Report found that engineering and construction companies are the most likely to claim that all of these practices above are widespread in doing business.<sup>171</sup>

Furthermore, the EU Anti-Corruption Report suggested that more than half of all companies say that corruption in public procurement managed by national governments amount up to 56 %. Whereas corruption in public procurement managed by regional and local governments amount up to 60%.<sup>172</sup>

The Special Eurobarometer 2013 survey on corruption used by the EU Anti-Corruption Report found that nearly 45 % of the Europeans interviewed in survey believe that bribery and the abuse of positions of power for personal gain are prevalent amongst officials that award public contracts.<sup>173</sup> The Member States where respondents are likely to believe that there is widespread of corruption practices by officials awarding public contracts in Italy around – 55 %, Croatia 58 %, Slovenia 60 %, Greece 55 %, the Netherlands 64 % and the Czech Republic 69 %. Member States with the most positive perceptions of officials that award public contracts were in the UK – 33 %, Luxembourg 32 %, Ireland 32 %, Finland 31 % and Denmark 22 %.<sup>174</sup>

According to Gustavo Piga and Tunde Tatrai the EU Anti-Corruption Report in the country chapter evaluations finds that public procurement is one of the areas that is the most vulnerable sector to corruption practices and the above prospection confirm this notion.<sup>175</sup> The Report suggested a

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<sup>170</sup> European Commission (2013), Flash Eurobarometer 398 on Internal Market Report, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_398\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf)

<sup>171</sup> European Commission (2013), Flash Eurobarometer 398 on Internal Market Report, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_398\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf)

<sup>172</sup> European Commission (2013), Flash Eurobarometer 398 on Internal Market Report, available on; [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_398\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_398_en.pdf)

<sup>173</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>174</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>175</sup> Piga, G and Tatrai, T. (2015) *Public Procurement Policy*. London and New York: Routledge, p. 5.

number of possible actions that Member States can take in addressing the policy shortcomings concerning public procurement and the EU Anti-Corruption Report suggested these general recommendations to the Member States.<sup>176</sup>

First the EU Anti-Corruption Report suggested that Member States should consider adjusting their risk assessment in order to detect the systematic use of corruption within public procurement.<sup>177</sup> The Report suggested the following general recommendations;

- a) Member States should consider developing risk assessments at the level of public procurement oversight, irrespective of their institutional setting, with the support of law enforcement or anticorruption and integrity agencies.
- b) Member States should consider ensuring a centralisation of data on detected corrupt practices and patterns, including those of conflicts of interests and revolving door practices.
- c) Member States should consider developing a based on risk assessments, tailor-made measurements for vulnerable sectors.
- d) Member States should consider implementing targeted anti-corruption policies for regional and local administrations in detecting corruption practices.
- e) Member States should consider developing common guidelines for use of red-flagging indicator systems and supporting contracting authorities to detect corruption, favoritism and conflicts of interest.

Second the EU Anti-Corruption Report suggested that Member States should consider implementing higher standards for transparency in respect to awarding procurement contracts.<sup>178</sup> The Report suggested the following general recommendations;

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<sup>176</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>177</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>178</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

- a) Member States should consider ensuring common minimum standards for transparency at local and regional level in relation to public procurement procedures.
- b) Member States should consider ensuring free access to public contracts, those including the provisions on rights, obligations and penalty clauses.
- c) Member States should consider improving further their transparency in public procurement procedures, pre and post-award through online publication in all of the administrative structures – those including central, regional and local level. Furthermore, Member States should consider ensuring more transparency of procurement in particular to state owned companies.

Third the EU Anti-Corruption Report suggested that Member States should consider strengthening of internal and external control mechanisms for the entire procurement cycle, and also during contract implementation.<sup>179</sup> The Report suggested the following general recommendations;

- a) Member States should consider that there is sufficient capacity of public procurement review bodies in place, consultative and oversight bodies, as well as courts of audit to carry out their verification in case of violation.
- b) Member States should consider strengthening the internal control mechanisms for purposes of prevention and detection of corrupt practices and conflicts of interests. Furthermore, Member States should consider developing common methodologies for anti-corruption and conflict of interest detection tools during the public procurement cycle.
- c) Member States should consider ensuring the recommendations of the courts of audit identifying irregularities in public procurement tendering.
- d) Member States should consider carrying out more effective checks on ownership of bidders and subcontractors.
- e) Member States should consider ensuring that there are adequate control mechanisms for procurement in place for state-owned companies.

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<sup>179</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

Forth the EU Anti-Corruption Report suggested that Member States should raise more awareness about the need for preventing and detecting of corrupt practices at all levels of public procurement.<sup>180</sup> The Report suggested the following general recommendations;

- a) Member States should consider improving the coordination between different public authorities that oversight with public procurement.
- b) Member States should consider raising more awareness and develop coherent guidelines on prevention of corrupt practices and conflict of interests in public procurement, especially aimed at regional and local governments.
- c) Member States should consider providing adequate training on technical and legal aspects of the public procurement process to prosecutors and the judiciary staff that investigate public procurement violation.

Fifth the EU Anti-Corruption Report suggested that Member States should strengthen the sanctioning regimes for those that breach public procurement contracts.<sup>181</sup> The Report suggested the following general recommendations;

- a) Member States should ensure proper application of dissuasive sanctions in relation to corrupt practices, favoritism or conflicts of interests in public procurement contracts.
- b) Member States should develop effective mechanisms for repealing decisions or annulling public procurement contracts.

The above-mentioned recommendations are general recommendations for all of the Member States in which the EU Anti-Corruption Report aims at raising the profile of addressing corruption in public procurement and making Member States aware of the key elements that they must have in place to prevent corruption in public procurement. Furthermore these recommendations were preparing the ground in 2014 for the implementation of EU directives on public procurement, which by April

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<sup>180</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

<sup>181</sup> European Commission (2014), EU Anti-Corruption Report, COM (2014) 38 final

2016, Member States had to transpose; Directive 2014/24/EU on public procurement,<sup>182</sup> Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors,<sup>183</sup> and Directive 2014/23/EU on the award of concession contracts into national law.<sup>184</sup> The following section describes the country chapter recommendations for all of the Member States.

## **2.4 Country chapter recommendations by the EU Anti-Corruption Report**

### **2.4.1 Austria**

The EU Anti-Corruption Report found that in Austria there are some obstacles to investigators in having access to banking information and thus, having a faster access to banking information where necessary would make the prosecution of domestic and international bribery more effective for investigation purposes.<sup>185</sup> The Report suggest to Austria to pay prioritising the investigation and prosecution of foreign bribery and have in place the essential capacity of the specialised prosecutors to deal corruption cases at domestic and foreign. Furthermore, the Report suggests an introduction of a monitoring mechanism for checking the declarations of assets and interest for elected and appointed senior officials and putting in place a sanctions for non-compliance with rules on declaring interests, incomes and assets.

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<sup>182</sup> Council Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65

<sup>183</sup> Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors [2014] OJ L 307

<sup>184</sup> Directive 2014/23/EU on the award of concession contracts [2014] OJ L 094

<sup>185</sup> European Commission (2014), *Annex 20: Austria to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_austria\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_austria_chapter_en.pdf)



### 2.4.2 Belgium

The EU Anti-Corruption Report found that Belgium has not addressed corruption consistently and concrete efforts could be made in prioritises corruption related policy at regional and federal level.<sup>186</sup> In particular introducing an integrity policy in the administrations and supporting integrity schemes at regional and federal level in order to prevent conflict of interest for all appointed and elected officials, at federal, regional and local levels. The Report also suggest that Belgium should increase the capacity of the justice system in order to avoid lengthy criminal proceedings in particular to corruption cases that in the past have not been prosecuted in time due to expiry of the statute of limitations. Providing sufficient capacity for the police to detect and investigate corruption-related offences. Lastly, Belgium should ensure that there is a proper legislation in place on political parties funding and that there is an effective supervisory mechanisms in place to audited political parties at federal and local under a unified supervision and audit structure.

### 2.4.3 Bulgaria

The EU Anti-Corruption Report found that for Bulgaria fighting the issue of corruption should still be priority because corruption still remains a serious challenge at different levels, and petty corruption continues to be reported in healthcare, police, customs, local authorities and beyond in Bulgaria.<sup>187</sup> The Report suggests that Bulgaria should improve further the independence and effectiveness of anti-corruption institutions and in particular the judiciary. Thus, Bulgaria is suggested to shield anti-corruption institutions and the judiciary from any political influence and

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<sup>186</sup> European Commission (2014), *Annex 1: Belgium to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_belgium\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_belgium_chapter_en.pdf)

<sup>187</sup> European Commission (2014), *Annex 2: Bulgaria to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_bulgaria\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_bulgaria_chapter_en.pdf)

appointing their management in a transparent, merit-based procedure. Furthermore, the Report finds that Bulgaria should increase the integrity and accountability of elected officials, and to put safeguard measurements in preventing electoral irregularities. Lastly, the Report suggests that Bulgaria should adopting a code of ethics for Members of the National Assembly and establish an effective supervisor mechanism in order to ensure dissuasive sanctions for electoral fraud.

#### **2.4.4 Croatia**

The EU Anti-Corruption Report found that in Croatia the politicisation and favouritism of the public administration and the integrity standards in the political system is a cause for concern.<sup>188</sup> The Report suggests that Croatia should establish an effective mechanism to prevent corruption in state-owned companies and should implement an effective anti-corruption action plan within state-owned companies to promote high accountability standards. Furthermore, the Report finds Croatia should implement effective protection mechanisms in both the public and private sectors for whistleblowers that report corruption and mismanagement. The EU Anti-Corruption Report also finds inadequacies of the rules of the conflict of interests of public officials at central and local levels and suggests that Croatia complies with the Constitutional Court decision of 2012 in ensuring there is a full complies with the conflict of interests of public officials rules.

The Report, also suggests that Croatia supports the Conflict of Interest Commission to improve their techniques of verification, including use of electronic tools, swiftly access to relevant information, cooperation with other authorities and has sufficient powers to impose deterrent sanctions in case of conflict of interests of public officials. Lastly, the Report suggests that Croatia implements a merit-based recruitment and promotion for public

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<sup>188</sup> European Commission (2014), *Annex 11: Croatia to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_croatia\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_croatia_chapter_en.pdf)

officials at mid-management and lower levels, and develops an adequate code of conduct for elected officials at central and local level.

#### **2.4.5 Cyprus**

The EU Anti-Corruption Report found that in Cyprus there should be greater focus on the financing of political parties.<sup>189</sup> The Report suggests that Cyprus should introduce a code of conduct for elected and appointed officials for them to declare any assets periodically, and to disclose any potential conflicts of interests. Furthermore, the Report suggests that Cyprus should lower the thresholds for donations to political parties, limit the possibilities of state-owned companies to sponsor political events, adequately regulate the donations for election candidates and campaigns. The Report also suggest that Cyprus should regulate that parties publish their financial statements and accounts online, in particular including the identity of donors, and to establish an external supervision of election candidates' income and expenditure. Lastly, the Report suggests that Cyprus reinforces the disciplinary body for public servants and endowing the necessary powers to anti-corruption institutions for a more effective implementation of anti-corruption policies.

#### **2.4.5 Czech Republic**

The EU Anti-Corruption Report found that in Czech Republic corruption is widely believed to represent a major obstacle in doing business and there are problems related to the misuse of public funds.<sup>190</sup> The Report suggests that Czech Republic should introduce legislation on the civil service that addresses well the conflicts of interest of public official and the legislation

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<sup>189</sup> European Commission (2014), *Annex 13: Cyprus to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_cyprus\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_cyprus_chapter_en.pdf)

<sup>190</sup> European Commission (2014), *Annex 3: Czech Republic to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_czech\\_republic\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_czech_republic_chapter_en.pdf)

should also enhance the stability of the civil service by safeguarding it against political interference. The Report also suggests that Czech Republic should introduce an ex-ante verification mechanism to prevent the conflicts of interest, and corrupt practices in relation to the European Structural and Investment Funds programmes. Czech Republic is also suggest in the Report to make further efforts to strength the independence of all bodies responsible for the implementation of EU funds. The EU Anti-Corruption Report also found that Czech Republic should regulate the properly electoral campaign expenditure and establish an impartial supervision of financing of political parties. Thus, Czech Republic should ensure that the financial reports of political parties are easily accessible to the public and they should disclose in detail party and electoral campaign expenditure in annual financial reports. Lastly, the EU Anti-Corruption Report suggests that Czech Republic should strengthen the capacities of prosecutors to handle corruption related cases in an independent way by re-examining the criteria for nomination of prosecutors, and Czech Republic should pursue reforms to strengthen the independent of anti-corruption bodies.

#### **2.4.7 Denmark**

The EU Anti-Corruption Report highlights that Denmark is amongst the EU's leading country in terms of transparency, integrity and has very low corruption practice.<sup>191</sup> Thus, the Report does not considered corruption to be a problem in Denmark. However, the EU Anti-Corruption Report suggests that there are still some room for improvement in Denmark and it suggests that there should be some further attention in addressing the financing of political parties. The Report suggests that Denmark should consider the GRECO recommendations to improve the transparency and supervisory instruments for the financing of political parties and individual candidates. The EU Anti-Corruption Report also observed that Denmark should improve the framework for prosecuting and sentencing Danish

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<sup>191</sup> European Commission (2014), *Annex 4: Denmark to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_denmark\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_denmark_chapter_en.pdf)

corporations on grounds of foreign bribery. Thus, the Report suggests that Denmark should consider to reviews the provision of dual criminality in respect of foreign bribery offences and ensuring that the small facilitation payment defence is clearly defined, and foreign bribery legal framework is in line with OECD Anti-Bribery Convention.

#### **2.4.8 Estonia**

The EU Anti-Corruption Report finds that the corruption in Estonia is considered low in comparison to other post-communist states, and petty corruption hardly affects citizens' everyday lives.<sup>192</sup> However, the Report finds that Estonia should pay additional efforts to further improve transparency in the financing of political parties and suggests that Estonia develops an effective monitoring instrument for political parties, and applies dissuasive sanctions in case of any violation. Furthermore, the Report suggests that Estonia develops guidelines on monitoring compliance with anti-corruption requirements at local government level and provides sufficient training to local governments. The EU Anti-Corruption Report also suggests that Estonia implements a parliamentary code of conduct together with supervision body to ensure scrutiny of economic interest declarations of public officials. Lastly, the Report suggests that Estonia conducts an independent and in-depth analysis into the risk of politicisation of appointments in public administration, state-owned companies, at local officials.

#### **2.4.9 Finland**

The EU Anti-Corruption Report finds that Finland is a leading country in the EU as a champion of anti-corruption and petty corruption is not an issue

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<sup>192</sup> European Commission (2014), *Annex 6: Estonia to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_estonia\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_estonia_chapter_en.pdf)

in Finland.<sup>193</sup> However, the Report finds that corruption cases in Finland appears in term of favouritism were exchanges on the basis of informal relationships, and lobbying by business people providing campaign financing to politicians have occurred. Thus, the Report suggests that Finland requests the municipalities and local authorities to ensure an adequate level of transparency in public contracts with private entrepreneurs. Furthermore, the Report suggest that Finland supports further the anti-corruption unit of the National Bureau of Investigations to effectively investigate corruption-related cases, and to coordinate anti-corruption procedures between government agencies more effectively.

#### **2.4.10 France**

The EU Anti-Corruption Report finds corruption in France is mainly related to cases in politics.<sup>194</sup> The report finds that the French politics has been subject to allegations of corruption and nepotism, spreading to high-ranking politicians and public officials. Thus, the Report suggests that France takes into account the GRECO recommendations on party findings, increases the transparency of financial information in election campaigns, and strengthens the supervisory capacity of the National Commission for Campaign Accounts and Political Funding. Furthermore, the Report suggests that France pursues its on-going reforms on the asset disclosure and conflicts of interest concerning appointed and elected public officials. The Report, also suggest that France improves the legislation on foreign bribery, and to include rules on dual criminality and jurisdiction in line with the recommendations by the OECD, GRECO and the UNCAC review mechanism. Lastly, the EU Anti-Corruption Report suggests that France provides additional resources to investigators and prosecutors dealing with

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<sup>193</sup> European Commission (2014), *Annex 26: Finland to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_finland\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_finland_chapter_en.pdf)

<sup>194</sup> European Commission (2014), *Annex 10: France to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_france\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_france_chapter_en.pdf)

corruption cases, and protect the operational independence of prosecutors of related corruption cases.

#### **2.4.11 Germany**

The EU Anti-Corruption Report finds that Germany is amongst the top ranking EU member state and is perceived to be among the consistently best performers of transparency and integrity.<sup>195</sup> However, the Report suggests that there are still some issues that have not been dealt in Germany, such as the lack of sanctions for corruption of elected officials and the absence of a revolving door policy, particularly in the public sector. The Report suggests that Germany should strengthen further their preventive measurements regarding the funding of political parties and those preventive measurements should be in line with the GRECO recommendations on electoral campaign accounts and donations. The Report also suggests that Germany should expand the legislation transposing the Framework Decision 2003/568/JHA on fighting corruption in the private sector with respect to some elements of the bribery offence. Lastly, the EU Anti-Corruption Report suggests that Germany should raise more awareness in small and medium-sized enterprises with regard to the foreign bribery offence.

#### **2.4.12 Greece**

The EU Anti-Corruption Report finds institutions that fight and combat corruption are facing the same resource pressure in Greece as felt by the whole of the public administration.<sup>196</sup> The Report first suggests that Greece should ensure that there are sufficient efforts to enable the national anti-

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<sup>195</sup> European Commission (2014), *Annex 5: Germany to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_germany\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_germany_chapter_en.pdf)

<sup>196</sup> European Commission (2014), *Annex 8: Greece to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_greece\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_greece_chapter_en.pdf)

corruption coordinator to implement accordingly the anti-corruption policies that Greece is pursuing. Furthermore, the Report suggests that Greece should consider to strengthen an independent functional review of the anti-corruption framework in line of the national anti-corruption action plan and ensuring that the national anti-corruption action plan is effectively implemented also across sectors that are vulnerable to corruption such as healthcare and tax administration. Second, the Report suggests that Greece addresses the issues of political parties' finances and strengthens the supervision body of party funding, and ensures the independence, efficiency and transparency of the Control Committee. Furthermore, the Report suggests that Greece reinforces the mechanisms for tracing donations and loans to political parties, and ensure sufficient resources for the Supreme Court of Audit to carry out effective verification of party funding. Thirdly, the EU Anti-Corruption Report suggests that Greece's institutions establish an in-depth ethical code of conduct for elected officials at national and local levels, and establish effective accountability tools for potential violations of these codes, thus including in case of corrupt practices or conflict of interests in particular. Furthermore, the Report suggests that Greece should seek to reduce any potential barrier to the investigation of corruption offences by releasing any immunity protection of high-ranking officials from investigations and thus in particular simplifying the procedure for lifting immunities, and ultimately reforming the statute of limitations rules concerning current and former members of the Government.

#### **2.4.13 Hungary**

The EU Anti-Corruption Report finds that in Hungary clientelism, favouritism and nepotism in public administration remain matters of concern, and thus there is a strong informal relation between businesses and political actors at local level, making local governments more vulnerable to



corrupt practices.<sup>197</sup> First the Report suggest that Hungary ensures that there is an independent verification mechanisms for asset declarations and conflicts of interest of elected and appointed officials, both at national and local levels. Furthermore, Hungary develops codes of conduct for elected officials at central, regional and local levels, which also covers conflict of interest and ensures sufficient accountability instruments for detecting any potential violations of such codes. The Report also suggests, that Hungary should take harder steps to address the corruption risks connected with clientelism and favouritism within public administration. Second, the EU Anti-Corruption Report suggests that Hungary should clarify the rules on accounting of political parties. Furthermore, the Report suggests that Hungary should strengthen the transparency and the independence of auditing of political parties checking party finance. Third, the Report suggests that Hungary should fight corruption in the healthcare system by eliminating the practice of gratitude payments, rewards or other forms of informal payments to public employees in the healthcare sector.

#### **2.4.14 Ireland**

The EU Anti-Corruption Report finds that even though the Irish Government in recent years has undertaken reforms at legislative and policy levels to address many of the issues concerning corruption and related issues of transparency, accountability and integrity, still more consideration could be given to ensure that corrupt behaviour are properly sanctioned.<sup>198</sup> First, the Report suggests that Ireland improves record of successful prosecutions of in corruption cases handled by the Standards in Public Office Commission, the Director of Corporate Enforcement and the police. Furthermore, the Report suggests that Ireland should enhances more power

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<sup>197</sup> European Commission (2014), *Annex 17: Hungary to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_hungary\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_hungary_chapter_en.pdf)

<sup>198</sup> European Commission (2014), *Annex 7: Ireland to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_ireland\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_ireland_chapter_en.pdf)

to all the relevant investigator authorities and extend their responsibilities in a provision to prosecute conflict of interest also to the regional and local levels. Second, the EU Anti-Corruption Report suggests that Ireland should place a threshold on the overall limit on the amount an individual may give to a political party and electoral candidates or elected representatives who are members of that party in line with the recommendations made by the Mahon Tribunal. Furthermore, the Report suggests that Ireland should regulate financing of referendum campaigns and impose a sensibly time-limit for political parties to release their financial disclosure obligations. Third, the Anti-Corruption Report suggests that Ireland should enhance further power and capacity to the independent urban planning regulator to investigate problems that local authorities have with fraud and corruption. Last, the Report suggests that Ireland implements a plan for the prevention of corruption at local authorities and ensures that there is an effective detection mechanism for conflicts of interest at local level.

#### **2.4.15 Italy**

The EU Anti-Corruption Report finds that despite considerable efforts corruption remains a serious challenge in Italy.<sup>199</sup> First the Report suggests that Italy should seek to strengthen the integrity regime for elected and appointed officials, at national, regional and local levels. Furthermore, the Report suggests Italy should revise and implement thorough ethical codes of conduct together with adequate accountability instruments, and tough sanctions for potential violations of such codes of conduct. The Report also suggests that Italy should consider promoting codes of ethics within political parties, and strengthen the legal framework on party funding. Second, the Report suggests that Italy should address the deficiencies of the statute of limitation as recommended in July 2013 in the context of the European Semester, and introduces more flexible rules on suspension and interruption. Furthermore, the Report suggests that Italy evaluates

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<sup>199</sup> European Commission (2014), *Annex 12: Italy to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_italy\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_italy_chapter_en.pdf)

accurately the risks of pending corruption cases becoming time-barred and ensures that prioritisation of cases that are running such risks. Third, the Report suggests that Italy strengthens the capacities of the national anti-corruption agency for it to perform an effective inspection and supervisory functions, also at regional and local levels. The Report also suggests, that Italy implements a uniform framework for internal controls and use of external independent audits at regional and local levels with regard to public spending, in particular to public contracts. Last, the EU Anti-Corruption Report suggests that Italy enhances an independent body for the verification of conflicts of interest and asset declarations of elected and appointed public officials.

#### **2.4.16 Latvia**

The EU Anti-Corruption Report found that in Latvia even though anti-corruption laws are gradually being developed and refined, the implementation in practice remains unsatisfactory.<sup>200</sup> First the Report suggests that Latvia continues to strengthen capacities and independence of the Corruption Prevention and Combating Bureau (KNAB) from potential political interference, particularly in supervisory and budgetary procedures. Furthermore, the Report suggests that Latvia promotes better use of centralised e-procurement for public contracts and enhances further the KNAB's efforts to detect corruption in public contracts. Second, the Report suggests that Latvia should pay more attention in improving the transparency of state-owned companies and redefines the professional selection criteria for supervisory and management posts. Third, the EU Anti-Corruption Report suggests that Latvia strengthens the capabilities and resources of the judiciary to handle corruption related cases in an independent way by reinforcing the role of self-governing judicial bodies in relation to appointments and career progression, by taking further measurements to uphold due process in disciplinary proceedings, and more

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<sup>200</sup> European Commission (2014), *Annex 14: Latvia to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_latvia\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_latvia_chapter_en.pdf)

importantly Latvia should restrict Parliament's powers to the confirmation of judicial appointments. Forth, the Report suggests that Latvia modifies and applies more strictly Parliament's Code of Ethics. Lastly, the Report suggests that Latvia issues guidelines on conflicts of interest of public officials and lifts administrative immunities for MPs.

#### **2.4.17 Lithuania**

The EU Anti-Corruption Report found that in Lithuania reinforcing the independence and effectiveness of anti-corruption institutions would help address challenges in public contracts, the financing of political parties, and healthcare.<sup>201</sup> First, the Report suggest that Lithuania should prioritises public contracts corruption related cases and develop additional preventive instruments within contracting authorities to assist detecting corruption at various stages of tendering, with a particular focus on the local level and the healthcare sector. Second, the EU Anti-Corruption Report suggests that Lithuania should enhance the resources of the Special Investigation Service (STT), by focusing more attention on the number of indictments and seriousness of cases. Furthermore, the Report suggests that Lithuania makes improvements in better coordinating institutions to proactivity investigate high-level corruption more efficiently. Third, the Report suggests that Lithuania reinforce the capacities and power of the Chief Official Ethics Commission in order to improve the procedures for checking the declarations of conflict of interest by elected and appointed officials, and monitoring violations more effectively. Forth, the EU Anti-Corruption Report suggests that political parties provide adequate information on their sources of funding and Lithuania enhances the capacities of the Central Electoral Commission to monitor more effectively expenditure and income of political parties.

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<sup>201</sup> European Commission (2014), *Annex 15: Lithuania to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_lithuania\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_lithuania_chapter_en.pdf)

#### **2.4.18 Luxembourg**

The EU Anti-Corruption Report found that in Luxembourg the absence of rules on access to information, lobbying, and the lack of a revolving-doors policy raise the risk of conflicts of interest and other undetected instances of corruption related acts.<sup>202</sup> First, the Report suggests that Luxembourg should increase the resources to fight financial and economic crime, including within the judiciary and the police. Second, the Report suggests that Luxembourg should introduce a supervisory mechanism applicable to the financing of individual candidates and campaign accounts, and making ensuring that the rules on donations from legal persons to individual candidates are coherent with the rules applicable to parties. Third, the EU Anti-Corruption Report suggests that Luxembourg should ensure an independent mechanism for properly verifying the conflicts of interest of elected officials and civil servants at national and local levels. Last, the Report suggests that Luxembourg should implement legislation on access to public information that establishes the responsibility of the public authorities to provide access to information, documents of public interest, and clearly defines the conditions under which requests may be denied.

#### **2.4.19 Malta**

The EU Anti-Corruption Report finds that addressing corruption has been a priority in Malta, but the financing of political parties remains largely unregulated and is a matter for concern.<sup>203</sup> First the Report suggests that Malta introduces a disclosure rule and caps on political donations. Furthermore, the Report suggests that there should be a ban on anonymous donations beyond a reasonable threshold in Malta and there should be

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<sup>202</sup> European Commission (2014), *Annex 16: Luxembourg to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_luxembourg\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_luxembourg_chapter_en.pdf)

<sup>203</sup> European Commission (2014), *Annex 18: Malta to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_malta\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_malta_chapter_en.pdf)

independent audits of political parties' accounts. Second, the EU Anti-Corruption Report suggests that Malta should improve the coordination among anti-corruption units to optimise the collection of evidence and priorities investigation and prosecution of corruption related cases. The Report also suggests that Malta should empower further the Permanent Commission against Corruption (PCAC) and allocate more resources in order to appoint specialists on anti-corruption. Third, the EU Anti-Corruption Report suggests that Malta should strengthen the capacity of the judiciary to deal with corruption related cases. The Report suggests that Malta should improve the appointment and dismissal procedures for judges, and to enhance more transparent and merit-based selection and removal of judges. Furthermore, the Report suggests that Malta accordingly enforces the decisions of the Commission for the Administration of Justice that find a breach of the Code of Ethics in the Judiciary. Forth, the EU Anti-Corruption Report suggests that Malta should continue its reforms at the Malta Environmental Planning Authority (MEPA) to build further public confidence in its integrity and impartiality.

#### **2.4.20 The Netherlands**

The EU Anti-Corruption Report finds that in the Netherlands integrity is traditionally highly valued and continuously there has been a strong public demand for transparency and accountability, both in the public and the private domain.<sup>204</sup> First, the Report suggests that the Netherlands should extend the rules on the assets and interests to elected officials and members of government. Furthermore, the Report suggests that the Netherlands should support a transparent verification system and develops a framework for post-employment conflicts of interest of former elected officials. Second, the EU Anti-Corruption Report finds that the Netherlands should focus more its efforts on the prosecution of both natural and legal persons for corruption in international business transactions. Also the Report

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<sup>204</sup> European Commission (2014), *Annex 19: The Netherlands to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_netherlands\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_netherlands_chapter_en.pdf)

suggests that the Netherlands should increase the resources and capabilities to investigative office that deals with the prosecution of foreign bribery. Last, the Report suggests that the Netherlands should increase the level of fines applicable to the legal persons of Dutch firms that engage in foreign bribery acts.

#### **2.4.21 Poland**

The EU Anti-Corruption Report finds that addressing corruption has been a priority in Poland prior to join the EU and the authorities have implemented adequate policies that have contributed to progress in fighting corruption, especially against petty corruption.<sup>205</sup> However, the Report first finds that Poland should take further reforms to safeguard the independence and effectiveness of anti-corruption institutions. The EU Anti-Corruption Report suggests that Poland establish a long-term strategy against corruption with a reasonable timeframe for implementing the strategy across different sectors that are vulnerable to corruption. Furthermore, the Report suggests that the strategy against corruption should also aim at reforming and increasing the capacities of the relevant anti-corruption institutions in Poland. Second, the EU Anti-Corruption Report suggests that Poland ensures that there are measurements in place to safeguards against potential politicisation of the Central Anti-Corruption Bureau (CBA) by introducing an impartial and transparent procedure for the appointment of it's the CBA Director. Also the Report suggests that Poland should continue to provide expertise training in order to increase the effectiveness of the CBA. The Report found that Poland should also improve the cooperation and coordination with police, and other special anti-corruption services and prosecution to deal more efficiently with corruption related cases. Third, the EU Anti-Corruption Report suggests that Poland should implement more effective measures in order to supervise state-owned

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<sup>205</sup> European Commission (2014), *Annex 21: Poland to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_poland\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_poland_chapter_en.pdf)

companies and increase transparency, professionalism and integrity standards in the public and the healthcare sectors.

#### **2.4.22 Portugal**

The EU Anti-Corruption Report finds that Portugal over the last decade has demonstrated a degree of political commitment to address corruption.<sup>206</sup> However, key institutions that combat corruption in Portugal are facing the same resource of pressure as the whole of public administration. Therefore, the EU Anti-Corruption Report suggests that Portugal in the context of the State reform that is currently being introduced after the economic crisis should pay more attention to anti-corruption initiatives. However, there is no national anti-corruption strategy in place in Portugal. Thus, first the EU Anti-Corruption Report suggests that Portugal should maintain a track record of successful prosecution of corruption cases. The Report also suggests Portugal should ensure sufficient resources and financial support for assist further the law enforcement agencies, the prosecution service and the judiciary. In order to deal more effectively with complex related corruption cases. Second, the EU Anti-Corruption Report suggests that Portugal should strengthen further the preventive detective tools on party funding and take into account GRECO recommendations on political party financing. The Report also suggests that Portugal should develop codes of conduct for elected officials at central and local levels, accompanied with sufficient accountability instruments to address any possible violations of these codes. Furthermore, the Report suggests that Portugal should consider developing ethical codes of conduct within political parties and should implement adequate standards on conflicts of interest. Third, the EU Anti-Corruption Report suggests that Portugal should sufficiently evaluate urban planning decisions on projects at local level to detect any risk elements of corruption practice and improve further the measurements of transparent decision-making at local level. Last, the Report suggests that Portugal

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<sup>206</sup> European Commission (2014), *Annex 22: Portugal to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_portugal\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_portugal_chapter_en.pdf)



should seek to further strengthening control instruments in this sector of corruption related cases at local government and urban planning at local level.

#### **2.4.23 Romania**

The EU Anti-Corruption Report finds that both petty and political corruption remains a systemic problem in Romania.<sup>207</sup> The Report suggests that the political will to address corruption and promote high standards of integrity has been inconsistent over time in Romania. The Cooperation and Verification Mechanism (CVM) Report of January 2014 highlighted that even though progress was made in many areas of judiciary and anti-corruption policies, the political will is far from a general consensus about pursuing the objectives set by the CVM. Thus, first the EU Anti-Corruption Report suggests that Romania should ensure the independence of anti-corruption institutions and the judiciary regarding non-partisan investigations. Furthermore, the Report suggests that Romania should ensure that court proceedings concerning high-level corruption cases related to elected and appointed officials are not politically intervened. The Report also suggests that Romania should reinforce the integrity standards in the judiciary and to address corruption more efficiently within the judiciary system. Second, the EU Anti-Corruption Report suggests that Romania should implement codes of conduct for elected and appointed officials, and ensures that accountability instruments are in place for detecting more efficiently corrupt practices and conflicts of interest. The Report suggests that Romania should develop ethical codes for political parties and establishes ethics pacts between parties to promote higher integrity standards in the political system. Furthermore, the EU Anti-Corruption Report suggests that Romania should ensures that there are no obstruction of justice is allowed in cases of political cases related to corruption and immunities are lifted for elected officials. Third, the EU Anti-Corruption

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<sup>207</sup> European Commission (2014), *Annex 23: Romania to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_romania\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_romania_chapter_en.pdf)

Report suggests that Romania should implement an anti-corruption national strategy to develop tools that prevent the level of informal payments. The Report suggests that Romania anti-corruption national strategy works to reduce the level of informal payments in the public contracts at central and local government, and in the public healthcare system. The Report furthermore suggests that Romania should consider improving the working conditions for medical staff and raises the level of professionalism within the Ministry of Health. Last, the EU Anti-Corruption Report suggests that Romania should effectively implement clear rules on revolving door practices in public contracts and raising awareness of the risks such practices entail, including EU-funded projects.

#### **2.4.24 Slovakia**

The EU Anti-Corruption Report finds that Slovakia faces problems with independence of the judiciary and finds close ties between the political and business elite undermines the functioning of anti-corruption efforts.<sup>208</sup> Thus, the EU Anti-Corruption Report suggest that structural reforms and measurements to address conflicts of interest between the political and business elite, and good coordination in investigations should therefore be prioritized in Slovakia. First, the EU Anti-Corruption Report suggests that Slovakia should increase the independence of the judiciary, in particular implement rules to clearly define the criteria for the removal from office of presidents and vice-presidents of courts. Furthermore, the Report suggests that Slovakia should strengthen the procedural guarantees in disciplinary proceedings against judges that have misused their position and ensures the independence of disciplinary panels. Second, the EU Anti-Corruption Report suggests that Slovakia should support a merit-based approach to appointments to management positions within the police departments and develops a strategy to detect and prosecute more effectively corruption related crimes. Third, the EU Anti-Corruption Report suggests that

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<sup>208</sup> European Commission (2014), *Annex 25: Slovakia to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_slovakia\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_slovakia_chapter_en.pdf)

Slovakia should increase the transparency of finances of political parties at local and regional levels. Thus, the Report suggest that Slovakia establishes an independent body to investigate and supervise party financing, and ensures that the sanctions are applied accordingly in case of any violations of political funding rules. Forth, the EU Anti-Corruption Report suggests that Slovakia should develop an effective policy to fight corruption cases affecting EU funds, public contracts, and corruption in the healthcare system. Last, the Report suggests that Slovakia should reinforce its efforts of law enforcement, prosecution and judiciary to pursue corruption cases affecting EU funds and public tenders more effectively at central and local levels.

#### **2.4.25 Slovenia**

The EU Anti-Corruption Report finds that Slovenia in recent years has seen a decline in the political will to fight corruption and there is a decline in the level of the integrity of high-level officials, both elected and appointed, and other officials within the public administration and state-owned companies.<sup>209</sup> Thus, first the EU Anti-Corruption Report suggests that Slovenia applies tougher penalties to elected and appointed officials at central and local levels for conflicts of interest and unjustified wealth. The Report also suggests that Slovenia develops codes of conduct and adequate accountability and preventive tools for violations of such codes for elected officials and appointed officials. Second, the EU Anti-Corruption Report suggests that Slovakia should seek to develop ethical codes within political parties and establishes a supervision body to check party funding and electoral campaigns more effectively. Third, the EU Anti-Corruption Report suggests that Slovenia should support and ensure the independence of the Commission for Prevention of Corruption is preserved, and its powers and capacity are further reinforced. The Report also suggests that Slovenia maintenance the operational independence of prosecution services

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<sup>209</sup> European Commission (2014), *Annex 24: Slovenia to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_slovenia\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_slovenia_chapter_en.pdf)

specialised in fighting financial and economic crime. Last, the EU Anti-Corruption Report suggests Slovenia should encourage a fair engagement in anti-corruption and effective collaboration by all relevant public institutions that address corruption in Slovenia.

#### **2.4.26 Spain**

The EU Anti-Corruption Report finds that Spain largely has shown good results in investigating corrupt practices at central and local levels.<sup>210</sup> However, the Report finds that recent large-scale corruption cases have revealed a number of alleged corrupt practices affecting public funds and financing of political parties. The Report finds that public spending at regional and local level has been particularly challenging and public tenders and urban development appear to be among the most vulnerable areas in Spain. Thus, first the EU Anti-Corruption Report suggests that Spain develops a tailor-made strategy for regional and local administrations to prevent corruption practices and establishes monitoring mechanisms to increase transparency of decision-making at local and regional governance. Second, the Report suggests that Spain should develop codes of conduct for elected officials at central, regional and local levels. The Report also suggests that Spain should develop ethical codes within political parties as recommended by the resolution of the Spanish Parliament in February 2013 and implements clear rules on asset disclosure and conflicts of interests for elected and appointed officials at central, regional and local levels. Furthermore, the Report suggests that Spain should reinforce the resources of the Office of Conflicts of Interests to carry out verifications in an independent and effective way. Last, the EU Anti-Corruption Report suggests that Spain should implement new law on transparency, access to public information and increases good governance, supported by an independent supervisory mechanism matched with a strict sanctioning system.

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<sup>210</sup> European Commission (2014), *Annex 9: Spain to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_spain\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_spain_chapter_en.pdf)

#### **2.4.27 Sweden**

The EU Anti-Corruption Report finds that Sweden is among the least corrupt countries in the EU and it has taken an ambitious approach to fighting corruption, and implemented several effective anti-corruption initiatives.<sup>211</sup> However, the Report finds that in Sweden a few areas of concern remain such as corruption risks at local levels and loopholes in the Swedish legal framework for prosecuting and sentencing Swedish corporations on grounds of foreign bribery. Thus, the Report first suggests that Sweden should seek to ensure that the liability of legal persons for foreign bribery is activated in cases where the offence is committed through lower-level employees, intermediaries, subsidiaries, or third-party agents including non-Swedish nationals. Furthermore, the Report suggests that Sweden should raise the level of penalties for corporations and other legal entities. Thus, the EU Anti-Corruption Report suggests that Sweden should consider revise the provision of dual criminality. Second, the EU Anti-Corruption Report suggests that Sweden improves the transparency of the funding of political parties and of individual candidates in line with recommendations suggested by GRECO. Furthermore, the Report suggest that Sweden should consider that the future legislation that are introduces have a general ban on donations from donors whose identity is not enclosed to the party or candidate, and the legalisation extends the scope to cover regional and local levels.

#### **2.4.28 United Kingdom**

The EU Anti-Corruption Report finds that the United Kingdom. Moreover has made progresses in encouraging its companies to engage from bribing officials abroad, through severe legislation and detailed guidelines.<sup>212</sup>

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<sup>211</sup> European Commission (2014), *Annex 27: Sweden to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_sweden\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_sweden_chapter_en.pdf)

<sup>212</sup> European Commission (2014), *Annex 28: United Kingdom to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_uk\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_uk_chapter_en.pdf)

However, the Report first suggests that for the UK to continued success on tackling foreign bribery it should take further preventive measures to risks of foreign bribery, and provide sector-specific guidelines to companies in areas which may be at increased risk, such as the defence industry. Second, the Report suggests that the UK should strengthen accountability in the governance of banks and thus including stricter law enforcement, and ensures that the beneficial owners of UK-registered companies are declared fully and in a transparent manner. Third, the EU Anti-Corruption Report suggests that the United Kingdom should impose limits on electoral campaign spending and capping donations to political parties. Furthermore, the Report suggests that the UK should ensure proactive monitoring misuse of political parties donations and prosecution of potential violations. The Report also suggests that the UK should consider lowering the thresholds for the reporting of financial holdings and for the registration of received gifts to elected official, and thus providing clear guidance on acceptable gifts for Members of Parliament. Forth, the EU Anti-Corruption Report suggests that the United Kingdom should address the issues identified by the Leveson Inquiry. In particular regarding the legitimate interaction between the press and the police, and such time limits on the employment of former police officers by the media should be clearly regulated.

The EU Anti-Corruption Report throughout this chapter generally calls for a developing stronger integrity standard in all of the Member States as the recommendations suggested above. Furthermore, the EU Anti-Corruption Report suggested key improvements in preventing corruption in a number of sectors that Member States seem to be vulnerable according to the Report. The following chapter analysis the EU Anti-Corruption Report as a form of reflexive governance that supports Member States to enhance their anti-corruption policy shortcomings as the Report suggested in this chapter.

## **Chapter 3**

### **3 The EU Anti-Corruption Report and Reflexive Governance**

#### **3.1 Introduction**

This chapter argues that the regulatory approach of the EU Anti-Corruption Report is best described as reflexive governance. The chapter is divided into four parts. The first part explains the context of the regulatory approach of the Report which relates to the emergence of new modes of governance in the European Union. It includes a discussion of the key method of the new governance approach in the EU, the open method of coordination, which has significantly changed the regulation and methods of governance at the supranational level. The second part introduces the concept of reflexive governance and explains the transformation of new governance into reflexive governance in EU policy-making. The second part also explains the growing use of reflexive forms of governance within the EU and shows examples how reflexive governance occurs. The third part introduces the theory of reflexive law that provides core insights into the regulatory nature of reflexive governance. The fourth part applies the theory of reflexive governance to the EU Anti-Corruption Report and demonstrates that the concept of regulation of self-regulation provides the key insight into the governance approach of the Report.

#### **3.2 New Governance in the European Union**

The emergence of new modes of governance in the European Union dates back to the Maastricht Treaty in 1992 and the introduction of the European Economic and Monetary Union (EMU). Ten years of successful experimentation with economic policy coordination enabled the launch of the EMU in 2002 and triggered a reorientation of European policy-making and change of methods of governance at the supranational level. The model of coordination of economic and fiscal policies was adopted for the coordination of employment policies in the form of the European

Employment Strategy (EES), as well as other coordination policies in several new policy areas. The underlying concept of governance based on policy coordination was outlined in the European Commission White Paper on European Governance in July 2001.<sup>213</sup>

The European Commission identified the reform of European governance as one of its four strategic objectives alongside democracy, transparency, and subsidiarity at the beginning of the new millennium in the White Paper.<sup>214</sup> It made use of the global debate on good governance to discuss opportunities for internal reform that aim at bringing the European Union closer to its citizens, rendering it more effective, and consolidating the democratic legitimacy of its institutions.<sup>215</sup> The Commission's White Paper on governance established five basic principles that could strengthen the good governance approach. These are openness, participation, accountability, effectiveness, and coherence.<sup>216</sup>

Openness is largely related to the importance of communication between the European institutions and the Member States as far as the decisions that the EU makes are concerned. This includes the use of a practical language in the public documents. Participation means the broad involvement of institutional bodies, agencies, social partners and civil society at all stages; from designing a policy concept to implementation of a policy, it constitutes a key condition for the quality and the effectiveness of the EU's policies. Accountability relates to the trusting and explicit roles of the participants in the process of decision-making. Effectiveness concerns the degree of achievement of targets that have been put in place on the basis of assessment processes of applied policy areas. Lastly, coherence relates to the synchronisation between the policies and the actions, as well as their

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<sup>213</sup> European Commission (2001), White Paper on European Governance, COM (2001) 428 final. pp. 7-11.

<sup>214</sup> Börzel, T. and V.V. Hüllen (2015), *Governance Transfer by Regional Organizations: Patching Together a Global Script*. London: Macmillan Distribution Ltd. pp. 33

<sup>215</sup> Börzel, T. Pamuk, Y., Stahn. S (2008) 'Good Governance in the European Union'. *Berlin Working Paper on European Integration No. pp 5-22*

<sup>216</sup> European Commission (2001), White Paper on European Governance, COM (2001) 428 final. pp. 7-11.



easy understanding. The applications of these five principles are intended to strengthen the principles of proportionality and subsidiarity according to the European Commission.<sup>217</sup>

Each principle is important by itself. However, they cannot be achieved through separate actions. Policies can no longer be effective unless they are prepared, implemented and enforced in an inclusive way. The White Paper calls for the renewing the Community method by following a less top-down approach and enlarging its policy tools through an increased use of non-legislative instruments.

The White Paper acknowledges the vital role that civil society plays in giving ‘voice to the concerns of citizens and offering services to people’s needs’ and involving civil society organisations at all levels of the policy process.<sup>218</sup> One of the concluding proposals of the White Paper aims at institutionalising the EU’s relationship with civil society by introducing a code of conduct that identifies responsibilities and improves accountability of all partners.<sup>219</sup> In involving EU-level civil society, organisations can be part of the EU policy-making process through a more structured processes of consultation.<sup>220</sup> This approach leads to a ‘transnationalization’ of policy process, meaning it is reinforced by provisions of the Lisbon Treaty on participatory democracy.<sup>221</sup>

The following section analyses the key guiding instrument for improving European governance proposed in the White Paper, which is the open method of coordination (OMC OMC was seen as a new form of integrative

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<sup>217</sup> European Commission (2001), White Paper on European Governance, COM (2001) 428 final. pp.11-28

<sup>218</sup> European Commission (2001), White Paper on European Governance, COM (2001) 428 final. pp.11-28

<sup>219</sup> European Commission (2001), White Paper on European Governance, COM (2001) 428 final. pp.11-28

<sup>220</sup> Börzel, T. and V.V. Hüllen (2015), *Governance Transfer by Regional Organizations: Patching Together a Global Script*. London: Macmillan Distribution Ltd. pp. 33

<sup>221</sup> European Council (2007), Presidency Conclusions, 21 – 22 June, 11177/1/07.

policy-making that enables it to meet external and internal pressures.<sup>222</sup> The OMC, as will be shown below, promotes a soft policy approach, which is applied to a growing number of policy areas, including social exclusion, pensions, education, health care, research and development.<sup>223</sup>

### 3.3 The Open Method of Coordination

The introduction of new forms of governance in the EU, and in particular the open method of coordination, has significantly changed the regulation and methods of governance at supranational level.<sup>224</sup> The OMC was presented at the European Council in Lisbon as the central tool for fulfilling the Lisbon agenda. However, elements of this method have a longer history within international governance. For instance, benchmarking and evaluations have been the main tools for the IMF and the OECD for decades.<sup>225</sup> In the EU context, the OMC is rooted in Treaty-based EU policy coordination processes introduced during the 1990s, such as Broad Economic Policy Guidelines (BEPG), and a European Employment Strategy (EES) developed in order to coordinate the economic policies of the member states after ratification of the Maastricht Treaty.<sup>226</sup> The OMC is defined as a broadly applicable governance instrument for EU policy-making at the Lisbon Socio-Economic Summit in 2000.<sup>227</sup> OMC was defined at Lisbon as a specific ensemble of procedural elements involving

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<sup>222</sup> Börzel, T. and R.A. Cichowski (2003), *The State of the European Union: Law, Politics, and Society*. Oxford and New York: Oxford University Press Inc, pp. 2-29.

<sup>223</sup> Charles, F. S. and J. Zeitlin (2008), 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', *European Law Journal*, **14**(3), pp. 271–327.

<sup>224</sup> Zeitlin, J. (2005), 'The Open Method of Coordination in Action. Theoretical Promise, Empirical Realities, Reform Strategy', pp. 447-503

<sup>225</sup> Zeitlin, J. (2005), 'The Open Method of Coordination in Action. Theoretical Promise, Empirical Realities, Reform Strategy', in J. Zeitlin and P. Pochet in collaboration with L. Magnusson (eds), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*. Brussels: Peter Lang, pp. 447–503.

<sup>226</sup> The BEPG procedure, which is based on Article 99 of the Treaty, is as follows: on the basis of a Commission recommendation, the Council, by a qualified majority vote, produces draft BEPGs that are submitted to the European Council, which adopts a conclusion. On this basis the Council, again acting by QMV, adopts the relevant recommendation. The EP is informed of the recommendations.

<sup>227</sup> Zeitlin, J. (2005), 'The Open Method of Coordination in Action. Theoretical Promise, Empirical Realities, Reform Strategy', in J. Zeitlin and P. Pochet in collaboration with L. Magnusson (eds), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*. Brussels: Peter Lang, pp. 447–503.

iterative benchmarking of national progress towards common European objectives and organized mutual learning. A four step governance architecture, modelled on the EES and the four steps, can be distinguished in relation to the OMC that have been summarised by Ralf Rogowski in his analysis of the White Paper as follows.<sup>228</sup>

- 1) Setting up of guidelines supplemented by timetables for achieving the goals in the short, medium and long term (the EU Commission makes proposals on the guidelines).
- 2) Introduction of quantitative and qualitative indicators and benchmarks as a means of comparing best practices (the EU Commission organises the exchange of best practices and makes proposals on indicators).
- 3) Translation of the European guidelines into national action plans by setting specific targets and adopting measures, thereby taking into account national and regional characteristics.
- 4) Follow-up system: monitoring and evaluating combined with peer review (this provides support to the processes of implementation and peer review). In their review of the national action plans the EU Commission and the Council regularly provide comments and recommendations that are often based on comparisons with the best performers and create additional benchmarks for each member state.

The non-binding nature of the OMC, in comparison to the traditional hard supranational legislation, is designed to facilitate the achievement of the EU's main goals by enhancing transparency, mutual learning and peer review, while leaving decision-making to the member states.<sup>229</sup>

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<sup>228</sup> Rogowski, R. (2013), *Reflexive Labour Law In The World Society*. Cheltenham: Edward Elgar, pp. 189-206.

<sup>229</sup> Scott. J. and D.M. Trubek (2002), 'Mind the Gap. Law and New Approaches to Governance in the European Union', *European Law Journal*, 8(1), pp. 1–18.

The OMC is an iterated method, repeating the policy cycle every one to three years, depending on the type of policy area in which they operate. An OMC is created by the European Council in areas of problem-interdependence that require policy coordination, but in which member states are not willing to delegate authority to the EU. After discussions with relevant committees, public and private stakeholders, and outside experts, the European Commission makes a proposal for a common strategy for dealing with the problems that have been identified.<sup>230</sup> Examples are the areas of employment and pensions where this practice has taken place. The Commission then suggests a series of guidelines and objectives to the Council of Ministers, who might adjust the guidelines and objectives before approving them. Generally, the guidelines are presented under a few overarching strategic pillars. For example, the guidelines for the employment OMC were initially presented under the four pillars of Employability, Entrepreneurship, Adaptability and Equal Opportunities. In addition to the policy guidelines, the EU Commission proposes quantifiable targets or objectives with timetables, either short or medium.<sup>231</sup>

In contrast to objectives pursued by using the traditional Community Method, objectives in OMC guidelines must be reaffirmed at the beginning of each cycle and can be amended or removed in the light of experience. Jonathan Zeitlin and his colleagues view this as a strong indication of Lisbon's institutionalisation, particularly if one considers the separate benchmarking devices and norms adopted by the European Council.<sup>232</sup>

Secondly, OMCs facilitate several new mechanisms and instruments designed to enhance monitoring of policy and performance, such as indicators, benchmarks and quantitative targets. The Member States are

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<sup>230</sup> Zeitlin, J., Barcevičius, E., and J.T. Weishaupt (2014), *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination*. London: Palgrave Macmillan. p. 24.

<sup>231</sup> Szyszczak, E. (2006), 'Experimental Governance: The Open Method of Coordination', *European Law Journal*, **12**(4), pp. 486–502

<sup>232</sup> Zeitlin, J., Barcevičius, E., and J.T. Weishaupt (2014), *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination*. London: Palgrave Macmillan. p. 25.

expected to produce National Action Plans or National Reports that outline the state of affairs in the related policy domains, and actions taken or planned in response to the new Community objectives. Throughout the course of the process, the EU Commission and the experts assigned by the EU Commission monitor the progress in each of the states and in the community as a whole. At the end of the annual, biennial or triennial cycle, the EU Commission - after consultations with the relevant experts, social partners, Parliament and other EU Community entities - presents a draft report of the progress made. For example, the Employment Strategy and the Broad Economic Policy Guidelines could make explicit recommendations from the EU member states. The designated Council body or joint Council must approve the Joint Report and submit it to the European Council.<sup>233</sup>

Thirdly, institutional devices have been introduced to assist cross-national learning. One significant institutional innovation is the creation of hybrid experts' groups that involve supranational and intergovernmental experts in a consultative body for the Council and Commission. These so-called experts' groups hold non-public meetings approximately every few months, which were invented to facilitate mutual learning processes by incorporating expertise into the OMC.<sup>234</sup> Though they have no official power, the personalised settings where discussions take place encourage a free exchange of ideas, and help to build trust between the Commission and Member State experts. In addition to the technical evaluation and monitoring, these groups and, in some cases, committees are responsible for the establishment of policy and performance indicators, which are critical for assisting the monitoring process and exchange of comparable information.<sup>235</sup> Also, in some OMCs, the EU Commission arranges

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<sup>233</sup> Armstrong, K.A. (2012), 'The Lisbon Strategy and Europe 2020: From the Governance of Co-ordination to the Co-ordination of Governance', in P. Copeland and D. Papadimitriou (eds), *The EU's Lisbon Strategy: Evaluating Success, Understanding Failure*. Basingstoke: Palgrave Macmillan, pp. 208–28.

<sup>234</sup> Trubek, D.M. and L.G. Trubek (2005), The Open Method of Co-ordination and the Debate over "Hard" and "Soft" Law. In Zeitlin, J. and Pochet, P.; Magnusson, L. (eds.) *The Open Method of Co-ordination in Action: The European Employment And Social Inclusion Strategies*. Bruxelles: Peter Lang, pp. 83-103.

<sup>235</sup> Trubek, D.M. and L.G. Trubek (2005), The Open Method of Co-ordination and the Debate over "Hard" and "Soft" Law. In Zeitlin, J. and Pochet, P.; Magnusson, L. (eds.) *The*

voluntary peer reviews in which Member State, stakeholders, the EU Commission, national and independent experts engage in a qualitative review of members' best practice, which may include site visits and the exchange of expert reports, and in-depth discussions varying on the policy area at stake.<sup>236</sup>

The Lisbon European Council described the OMC as a fully decentralised approach, incorporating regional and local governments, and the EU Commission develops benchmarking exercises for managing change by networking with different providers and users, namely the interest groups, companies and NGOs. OMC is a particularly flexible EU governance tool, which has been designed to fit the policy logic of different domains, such as employment, pensions, education, healthcare, the level of problem interdependence, and the national sensitivity around the particular concerning area.<sup>237</sup>

After the re-launch of the Lisbon Strategy in 2005, on the bases of the recommendations of the two Kok reports, the OMC for economics and employment policies were integrated under the Lisbon agenda. This redesign of the OMC did address the problems of effectiveness, legitimacy and visibility by calling for a broader set of actors to be involved at member state level.<sup>238</sup> However, other issues, like the specificity of policy targets and democratic participation, remain problematic.<sup>239</sup> When the Lisbon Strategy expired in 2010, it was replaced by the Europe 2020 Strategy, which broadened the commitment to EU social cohesion objectives by

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*Open Method of Co-ordination in Action: The European Employment And Social Inclusion Strategies*. Bruxelles: Peter Lang, pp. 83-103.

<sup>236</sup> Pülzl, H. and M. Lazdinis (2011), 'May the Open Method of Coordination be a new instrument for forest policy deliberations in the European Union?', *Forest Policy and Economics*, **13**(6), pp. 411–418.

<sup>237</sup> Kjaer, P.F. (2010), *Between Governing and Governance. On the Emergence, Function and Form of Europe's Post-National Condition*. Oxford and Portland, OR: Hart, pp. 110 – 112.

<sup>238</sup> Rogowski, R. (2008a), 'The European Social Model and Law and Policy of Transitional Labour Markets in the European Union', in R. Rogowski (ed), *The European Social Model and Transitional Labour Markets–Law and Policy*. Aldershot: Ashgate, pp. 9–27.

<sup>239</sup> <sup>239</sup> Kjaer, P.F. (2010), *Between Governing and Governance. On the Emergence, Function and Form of Europe's Post-National Condition*. Oxford and Portland, OR: Hart, pp. 110 – 112

introducing new headline targets and integrated guidelines aimed – inter alia – at reducing poverty and social exclusion.<sup>240</sup>

From a legal perspective, the OMC is non-binding and ultimately voluntary in nature. The OMC is designed to be flexible. Its voluntary nature allows member states to amend reforms in accordance with the structures of their regimes, institutional networks and their specific circumstances.<sup>241</sup> It allows for a wide-ranging participation of social partners. Nevertheless, if a Member State decides not to cooperate or chooses à la carte which policies it wishes to follow while resisting others, there are no hard sanctions that could be imposed.

Therefore, the effectiveness of the OMC mainly depends on the participants' willingness to cooperate or, to use the language of reflexive law, to engage in self-regulation.<sup>242</sup> However, from a policy-oriented view, it is a widely-shared belief that in areas such as employment and social policy, the OMC is the suitable method because Member States are largely unwilling to transfer sovereignty beyond coordination. The soft law approach of the OMC appears to have advantages for national governments, because they might get impulses to reform their systems without losing their sovereignty.<sup>243</sup>

In theory, the OMC prompts a learning process, in which member states are subjected to benchmarking, peer review and evaluations of their

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<sup>240</sup> Barcevičius, E. and J. Zeitlin (2014), *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination*. Hampshire: Palgrave Macmillan. pp. 2-3.

<sup>241</sup> Zeitlin, J., Barcevičius, E., and J.T. Weishaupt (2014), *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination*. London: Palgrave Macmillan. p. 25.

<sup>242</sup> Rogowski, R. (2013), *Reflexive Labour Law In The World Society*. Cheltenham: Edward Elgar, p.191.

<sup>243</sup> Deakin, S. and R. Rogowski (2011), 'Reflexive Labour Law, Capabilities and the Future of Social Europe', in R. Rogowski, R. Salais and N. Whiteside (eds), *Transforming European Employment Policy – Labour Market Transitions and the Promotion of Capability*. Cheltenham: Edward Elgar, pp. 229–54.

progress.<sup>244</sup> The outcomes of the ‘OMC in action’ show few examples of successful learning.<sup>245</sup> However, there seems to be some evidence of learning from negative experience. The results of evaluations and benchmarking can lead to open criticism of Member States governments. The so-called soft sanctions of ‘naming and shaming’ can harm the reputation of member states that score less favourably and put their governments under pressure to conform.<sup>246</sup>

The OMC has been criticized in a number of ways. Doubts have been voiced, for example, about the implementation process, alleging that the production of the National Action Plan is often an affair solely involving technocrats and government officials.<sup>247</sup> Furthermore, sociological accounts of the monitoring process see it riddled with cultural misunderstandings and linguistic ambiguities. It has also been suggested that a proper theoretical account of the use of OMC in economic, employment and social policies is lacking.<sup>248</sup>

### 3.4 Reflexive governance

It will be argued in the following that we witness a transformation of new governance into reflexive governance in EU policy-making. There is a growing use of reflexive forms of governance within the EU that transforms the technocratic limits of the OMC in order to develop more effective policies, regulations and laws. Reflexive approaches view diversity of policies, laws and practices across the EU Member States as the basis for

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<sup>244</sup> Kjaer, P.F. (2010), *Between Governing and Governance. On the Emergence, Function and Form of Europe's Post-National Condition*. Oxford and Portland, OR: Hart, pp. 110 – 112.

<sup>245</sup> Van der Meer, M., Visser, J. and T. Wilthagen (2005), ‘Adaptive and Reflexive Governance: The Limits of Organized Decentralization’, *European Journal of Industrial Relations*, **11**(3), pp. 347-365.

<sup>246</sup> Trubek, D.M. and L.G. Trubek (2010), ‘The World Turned Upside Down: Reflections on New Governance and the Transformation of Law’, *Wisconsin Law Review*, **2010**(2), pp. 719–26.

<sup>247</sup> Zeitlin, J. (2005), ‘The Open Method of Coordination in Action. Theoretical Promise, Empirical Realities, Reform Strategy’, in J. Zeitlin and P. Pochet in collaboration with L. Magnusson (eds), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*. Brussels: Peter Lang, pp. 447–503.

<sup>248</sup> Rogowski, R. (2013), *Reflexive Labour Law In The World Society*. Cheltenham: Elgar, pp. 189-206.



experimentation and mutual learning within the overall process of European governance. There are three main aspects that distinguish OMC and new governance from reflexive governance.

Firstly, the EU Commission uses new governance and OMC as a top-down approach. It operates with a model that ideas developed at the EU level gradually influence developments at national or sub-national level. Change occurs as a result of shaming by the Commission. Reflexive governance suggests instead a holistic approach and argues that policy change may result as much from bottom-up as top-down pressures. Key are processes of diffusion through mimesis or discourse, deliberation, learning, and networks.

Secondly, reflexive governance emphasises the multilevel nature of governance. The multilevel approach transcends a new governance approach insofar as decision-making authority is distributed across more than one level of relatively autonomous public-sector institutions. In that, reflexive governance promotes a shift of responsibilities to a lower level of governance and views governance as supportive of self-regulation.

Thirdly, reflexive governance argues that this shift of responsibilities has to be reflected in the use of new legal instruments. The OMCs resort to moral or political pressure in only a second-best solution. Flexibilisation of existing legal instruments constitute a core concern of reflexive governance.

Reflexive governance has been introduced as a new concept that responds to a shift in understanding processes of decision-making, policy making and policy implementation. This can broadly be described as a shift from a primary focus on the top down activities of government, whether operating through regulatory, financial or educational instruments, to governance, which recognises a much broader mix of participants involved in policy

making and implementation processes.<sup>249</sup> These actors are active at various governance levels, ranging from global to local, with often overlapping and conflicting jurisdictions. It is through networks around government ministries on regional, national and local levels responsible for a policy sector that policy gets formulated and implemented.

Reflexive forms of governance enable stakeholders to frame and tackle problems in collaboration. Key component to the success of reflexive governance is to include individuals, organisations and agencies in collective learning and collaboration. This means breaking away from routines that are no longer appropriate to the problem, and experimenting, adapting and reviewing new measures in a search for more flexible relations.<sup>250</sup> This includes viewing the policy process as shared problem construction and searching for collective solutions to a similar problem. Since various groups of people conceive of the world in different ways, different actors will frame the object of governance and its boundaries differently. How these different framings are interactively and mutually negotiated has an important bearing in reflexive governance. According to Schutter and Lenoble, there are four key characteristics of reflexive governance, which are collective learning, active participation, global interaction, and innovative problem-solving.<sup>251</sup>

- a) Collective learning is a key element of reflexive governance approaches. The aim is to provide a platform for dialogue and mutual learning between different levels of governance and actors engaged in different practices. The line of communication here is not vertical and not a feedback mechanism. Reflexive governance transcends a top-down approach by shifting decision-making responsibilities to and into an organised discussion, where there is the possibility for a broader spectrum of perspectives that can be heard, in

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<sup>249</sup> De Schutter, O. and J. Lenoble (2010), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. Oxford and Portland: Hart Publishing, pp. 60 – 62.

<sup>250</sup> Scott, C. (2008), 'Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The "Heineken Effect"', in N. Boeger, R. Murray and C. Villiers (eds), *Perspectives on Corporate Social Responsibility*. Cheltenham: Edward Elgar, pp. 170–85.

<sup>251</sup> De Schutter, O. and J. Lenoble (2010), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. Oxford and Portland: Hart Publishing, pp. 60 – 62.

which compromise must be reached between the participants on the basis of rational argument and experiences. However, the reflexive approach to governance transient collaborative-deliberative approaches, represented by the work of Charles Sabel and his colleagues,<sup>252</sup> which promote local experimentalism and use Habermas' discourse theory of communicative action.<sup>253</sup> Reflexive governance does not privilege consensus and allows room for as much dissensus as necessary. The bases of success for reflexive governance depends on the participants to actively engage and participate in dialogue and experimentation, and thereby engage in the process of mutual learning. Learning is conceived as a continuous process of reflexive learning in which knowledge is developed through a feedback circle between different actors characterised by double-loop learning<sup>254</sup> that focuses on rethinking of existing policies and strategies. This approach suggests a new set of dynamics that enables learning between a mixture of governmental and non-governmental participants.<sup>255</sup> The work on reflexive learning contributes to the previous literature on reflexive approaches to governance by integrating theories of collective and mutual learning with organisational theory and links the process of collective learning to the three other core aspects of reflexive governance such as active participation, global interaction and innovative tools that can lead to implementation of knowledge.

- b) Active participation: Reflexive governance emphasises that active participation of a wider set of actors at domestic, regional, and local level is key to successful policymaking. It allows for interest groups and expert individuals to become active participants and engage in exchange of

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<sup>252</sup> Sabel, C.F. and J. Zeitlin (2008), 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', *European Law Journal*, **14**(3), 278–80.

<sup>253</sup> Habermas, J. (1996), *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. Cambridge: Polity.

<sup>254</sup> Kolb, A.Y and D. A. Kolb (2011) 'Experiential Learning Theory: A Dynamic, Holistic Approach to Management Learning, Education and Development'. *The SAGE Handbook of Management Learning, Education and Development*. pp. 42-68 and Argyris, C. and Schön, D. (1996) *Organizational learning II: Theory, method and practice*, Reading, Mass: Addison Wesley. pp. 39-43.

<sup>255</sup> Crona, B.I. and J.N. Parker, (2012), 'Learning in Support of Governance: Theories, Methods, and a Framework to Assess How Bridging Organizations Contribute to Adaptive Resource Governance', *Ecology and Society*, **17**(1), p. 32.

knowledge between different levels of actors involved in the process of policymaking. This is unlike the ‘new governance’ approach, where the Commission and governments of Member States are the main actors that participate in the process of policymaking. Reflexive governance means inclusion of civil society and citizen groups in consultation processes and supporting governance in shaping policy and regulation.<sup>256</sup> It also means shifting responsibility to lower levels and engaging citizens in policymaking.<sup>257</sup> The representation of different interests of stakeholder groups is possible, although the representation of larger sections of citizens cannot be guaranteed by this procedure and complex collective choice must be part of a concept of active participation.<sup>258</sup> Nevertheless, from a reflexive governance perspective, it is important to collaborate and involve local movements, NGOs and individual experts at local level in policymaking and the process of preparing policies and regulations.<sup>259</sup>

- c) Global interaction: The theory of reflexive governance emphasises that governance at national and local level has to be understood as part of global responses to global problems. Thus, it sees globalisation as an opportunity for reflexive governance to gain useful knowledge and for benchmarking national policy and regulations against international standards. Furthermore, reflexive governance is aware that national and local initiatives must be evaluated and enriched in the light of fast-changing global conditions.<sup>260</sup> It recognises the need for global knowledge transfer and the willingness and ability to exchange useful knowledge. The global knowledge transfer involves a number of steps that include idea creation,

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<sup>256</sup> Vergragt, P.J. and H.S. Brown (2007), ‘Sustainable mobility: from technological innovation to societal learning’, *Journal of Cleaner Production*, **15**(11-12), pp.1104 – 1115.

<sup>257</sup> Rogowski, R. (2011), ALACs and the Concept of Citizen Participation in the Light of European Law. Warwick School of Law Research Paper No. 2010/25.

<sup>258</sup> De Schutter, O. and J. Lenoble (2010), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. Oxford and Portland: Hart Publishing, pp. 97 – 102.

<sup>259</sup> Magone, M. J. (2015), *Routledge Handbook of European Politics*. London and New York: Routledge Publishing, pp. 31- 32.

<sup>260</sup> De Schutter, O. and J. Lenoble (2010), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. Oxford and Portland: Hart Publishing, pp. 97 – 102.

sharing, evaluation, dissemination and adoption.<sup>261</sup> These five steps are key for reflexive governance because decision-making processes in reflexive governance usually are not based on a single event, but rather a series of interactions and discoveries that make use of knowledge in different local, national and global settings.<sup>262</sup>

- d) Innovative problem solving: The theory of reflexive governance pays particular attention to process of innovation and experimentation in solving policy shortcomings. This includes capacities to create new solutions to policy shortcomings, as well as improving regulations, trainings, structures, technology and knowledge transfers. However, new instruments and policy do not automatically emerge from old instruments and policy. This requires innovative experimentalism. For example, exchanges between different regions can foster innovation, as each region will have to redefine its policies, strategies and improve on them in light of the successes and failures of others that have used a particular instrument.<sup>263</sup> An important condition in order to successfully produce new ideas is innovative training, which then can lead to the discovery of new effective instruments. In order to learn from experience innovatively it is crucial to design mechanisms that can monitor failure and success of past experience. In other words, knowledge has to be converted from tacit to explicit knowledge.<sup>264</sup> This process requires tools such as databases, or apps that can allow access to best practice examples. Technology has been fundamental to innovation and it has enhanced wider participation throughout the world.<sup>265</sup> For instance, nowadays surveys can be carried out through online platforms and the use of technology has been useful to evaluate the knowledge through

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<sup>261</sup> Levine, S. S. and Prietula, M, (2012), 'How Knowledge Transfer Impacts Performance: A Multi-Level Model of Benefits and Liabilities', *Organization Science*, **23**(6), pp.1748-1766.

<sup>262</sup> Crona, B.I. and J.N. Parker, (2012), 'Learning in Support of Governance: Theories, Methods, and a Framework to Assess How Bridging Organizations Contribute to Adaptive Resource Governance', *Ecology and Society*, **17**(1), p. 32.

<sup>263</sup> De Schutter, O. and J. Lenoble (2010), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. Oxford and Portland: Hart Publishing, pp. 97 – 102.

<sup>264</sup> Turner, S. (2015), *Understanding the Tacit*. London and New York: Routledge, pp. 3 – 17.

<sup>265</sup> Castells, M. and G. Cardoso (2005), *The Network Society From Knowledge to Policy*. Washington, DC: Johns Hopkins Center for Transatlantic Relations. pp. 3 – 23.

survey, which then leads to further innovation and experimentation of policies.<sup>266</sup> Finally, online platforms have been key to lowering the barriers for the dissemination of knowledge dramatically and have been a good platform to obtain knowledge for innovation. It is easier than ever before to target and inform people in both desirable and rather undesirable ways. For instance, groups can discuss new ideas through online tools and spread valuable information on an independent basis. Such global participants can make citizens a valuable source and can help to create acceptance and transparency tools, which lead to a potentially innovative and better policy.<sup>267</sup>

The four elements/features of reflexive governance above, when applied to policies and initiatives of the EU, can explain why new governance is gradually transforming into reflexive governance. Furthermore, the theory of reflexive governance can be enhanced by using social system theory as demonstrated by Ralf Rogowski. In doing so, it quickly becomes clear that the notion of reflexive governance is based on the concept of reflexive law. Reflexive law is a means to develop and find new ways to support reflexive policy-making in the EU. The following section explains the theory of reflexive law and its role in reflexive governance.

### **3.5 Reflexive law**

The theory of reflexive law adds important elements to the theory of reflexive governance in accordance with social systems theory. Reflexive law views and understands the legal system as an autonomous function system within society, placed on the same level as the economy and the political system. According to Niklas Luhmann, the legal system is guided by the necessity to safeguard its self-reference and self-reproduction, in

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<sup>267</sup> Loorbach, D. (2010), 'Transition Management for Sustainable Development: A Prescriptive, Complexity-Based Governance Framework', *Governance*, **23**(1), pp. 161–183.

other words its autopoiesis.<sup>268</sup> Reflexive law provides the basis for an evaluation of the limits, but also the potentials of law as a mechanism for social change.<sup>269</sup>

According to Luhmann's theory of society,<sup>270</sup> subsystems such as law and politics are operationally closed and cognitively open systems of communication. Operational closure means that they can reproduce themselves through self-regulations of these communications.<sup>271</sup> It leads in case of law to a normatively closed system of counterfactually stabilised expectations. Only law transmits normative validity to its elements and this process allows for legislation and adjudication to take place, which enable law to create law.

In Luhmann's theory of societal development, possibilities for reflexive processes increase when society has adopted functional differentiation as its mode of integration.<sup>272</sup> Luhmann demonstrated this in relation to what he calls positivisation of law and the argument goes as follows. Reflexivity takes place when the legal system becomes an autonomous function system of society. Reflexivity arises as a by-product of norm application in decision-making. It defines the process of presenting new types of norms for the regulation of norm application. By evolving second-order norms, the legal system becomes able to carry out decision-making founded on the application of the binary code legal and illegal. Therefore, reflexivity contributes to the closure of the system and to its autonomy.<sup>273</sup>

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<sup>268</sup> Rogowski, R. (2015), Luhmann, Niklas (1927–98) Blackwell Encyclopedia of Sociology, 2<sup>nd</sup> Edition, Wiley Blackwell 2015, pp. 1 – 6.

<sup>269</sup> Rogowski, R. (2013), *Reflexive Labour Law In The World Society*. Cheltenham: Elgar, pp. 33.

<sup>270</sup> Luhmann, N. (2012), *Theory of Society*, Vol. 1. Stanford: Stanford University Press, pp. 18-99.

<sup>271</sup> Luhmann, N. (1992), 'Some Problems with Reflexive Law', in G. Teubner and A. Febbrajo (eds), *State, Law and Economy as Autopoietic Systems. Regulation and Autonomy in a New Perspective. European Yearbook in the Sociology of Law*. Milan: Giuffrè, pp. 389–415.

<sup>272</sup> Luhmann, N. (1990), 'The Self-reproduction of Law and its Limits', in N. Luhmann, *Essays on Self-Reference*, New York: Columbia University Press.

<sup>273</sup> Luhmann, N. (2014), *A Sociological Theory of Law*, 2nd edition, London and New York: Routledge, pp. 164.

Reflexivity in the sense of ‘norming of norms’ is not unfamiliar to legal theory and is discussed in numerous ways. Hans Kelsen’s idea of a pyramid of norms as a self-validating mechanism of law in which higher norms provide legitimacy to lower-ranking norms is an example.<sup>274</sup> Another example is H.L.A. Hart’s concept of secondary legal laws as norms of ordering primary legal norms.<sup>275</sup> Reflexivity as an instrument of self-control of law and stabilizer of positivisation of law can be distinguished from the founding reflexivity connected to the stabilization of expectations. Fundamental for the development of law as a system according to Luhmann is the development of reflexive expectations. The processing of normative expectations lies at the heart of the evolution of law as an autonomous legal system in society.<sup>276</sup>

Ralf Rogowski distinguishes between internal and external reflexivity in system theoretical accounts of the legal system.<sup>277</sup> The main interest of Niklas Luhmann was in reflexive processes inside systems. With the concept of reflexive law, Gunther Teubner<sup>278</sup> focuses on external reflexivity in inter-systemic links. In his new theory of regulations, reflexivity refers to the law’s capability to reflect on its regulatory abilities. The theory of reflexive law is not merely an abstract interpretation of modern law, but has solid implications for regulatory design. It argues that, in seeking to influence other autopoietic systems, which are operationally closed to their environment, the legal system resorts to indirect means of regulation.

The main reasons are that legal intervention is dependent on self-regulation within the systems, which are the target of legal intervention. For regulation to be successful, it has to facilitate self-reflection and self-regulation. The

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<sup>274</sup> Kelsen, H. (1967), *Pure Theory of Law*. 2nd edition. Berkeley and Los Angeles, CA: University of California Press.

<sup>275</sup> Hart, H.L.A. (1997), *The Concept of Law*. 2nd edition. Oxford: Clarendon Press.

<sup>276</sup> Luhmann, N (2014) *A Sociological Theory of Law*, 2nd edition, London and New York: Routledge, p. 164.

<sup>277</sup> Rogowski, R. (2013), *Reflexive Labour Law In The World Society*. Cheltenham: Elgar, pp. 35.

<sup>278</sup> Teubner, G. (1993), *Law as an Autopoietic System*. Oxford: The European University Institute Press Series. Blackwell Publishers. pp. 1-13.



forms of law have to shift from substantive to procedural law.<sup>279</sup> This Law becomes reflexive when it understands that regulation depends on processes of self-regulation within other social systems. The regulation of other social systems needs a sophisticated reinterpretation of societal prerequisites into legal facilitation. Regulation of other social systems differs because there are no essential internal guidelines for the legal system to constrain any potential destructive use of regulations. Thus, the legal system has to rely on external sources to assess its impact.<sup>280</sup>

Teubner's well-known regulatory trilemma is a good example of an analysis of the limits of regulation. Hugh Collins describes this trilemma as 'either the legal rules may fail to have an impact on social practice, or they may subvert the desirable social practices by making impractical demands, or the law may lose the coherence of its own analytical framework by seeking to incorporate sociological and economic perspective in its reasoning'.<sup>281</sup> Teubner called his account of the trilemma a 'strategy for post-regulatory law', but it is in fact a complex account of modern limits and potentials of legal regulation.

Teubner proposes as solution for the trilemma that regulation has to become regulation of self-regulation. Ralf Rogowski, in his account of successful legal regulation, adds that self-regulation requires as precondition law's own self-regulation. Reflexive law means that law transforms itself so that it becomes capable of facilitating self-regulation in other systems. This means, in practical terms, the development of new forms of law, in particular soft law, and a shift to procedural tools that allow law to influence self-regulation indirectly.<sup>282</sup>

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<sup>279</sup> Teubner, G. (1983), 'Substantive and Reflexive Elements in Modern Law', *Law and Society Review*, 17(2), 239-85.

<sup>280</sup> Rogowski, R. (2013), *Reflexive Labour Law In The World Society*. Cheltenham: Elgar. p. 44

<sup>281</sup> Collins, H. (1999), *Regulating Contracts*. Oxford: Oxford University Press, pp. 68-69.

<sup>282</sup> Rogowski, R. (2013), *Reflexive Labour Law In The World Society*. Cheltenham: Elgar. p. 37

The idea of proceduralism is inspired by a number of debates, amongst them the legal philosophy of Jürgen Habermas. In Habermas opus magnum on law, *Between Facts and Norms*, Habermas suggests that proceduralism is not just an important form of law in modern societies, but part of a paradigm shift towards deliberation as a form of regulation.<sup>283</sup> For Jacques Lenoble, the paradigm shift to procedure in governance results from the failure of the dominant formal and material programmes of modern law.<sup>284</sup> Others argue that proceduralisation is linked to formalisation and according to Rudolf Wietholter a particular form of juridification.<sup>285</sup>

However, the reflexive law transience proceduralism, which is based on Habermas theory of modern law as deliberation, is ill-suited to an analysis of supranational forms of law-making. OMC leaves the idea of polity behind.<sup>286</sup> Indeed, the OMC is an example of reflexive governance and reflexive new forms of law that facilitate self-regulation in Member States.<sup>287</sup>

The Commission uses methods such as recommendations, monitoring, and peer review to create new forms of soft law that facilitate self-regulation. These new modes of governance are not legally binding. From the beginning, European Community and European Union practice has relied on a range of not legally binding instruments and the European institutions themselves envisaged soft law and self-regulation as regulatory alternatives.

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<sup>283</sup> Dawson, M. (2011), *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy*. Cambridge: University of Cambridge Press. pp. 105-118

<sup>284</sup> Lenoble, J. and M. Maesschalck (2010), *Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance*, in *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*, Oxford: Hart, pp. 3-21.

<sup>285</sup> Hendry, J. (2008), 'Governance, Proceduralisation and Justice: Some Challenges to the Legal Paradigm', *Law and Critique: Special Issue on Governance, Civil Society & Social Movements*, 19(3), pp. 345-361

<sup>286</sup> Armstrong, K.A. (2012), 'The Lisbon Strategy and Europe 2020: From the Governance of Co-ordination to the Co-ordination of Governance', in P. Copeland and D. Papadimitriou (eds), *The EU's Lisbon Strategy: Evaluating Success, Understanding Failure*. Basingstoke: Palgrave Macmillan, pp. 208-28.

<sup>287</sup> Rogowski, R. (2013), *Reflexive Labour Law In The World Society*. Cheltenham: Elgar, pp. 190-192.

The European instruments and mechanism that are discussed under the heading of soft law are numerous. They can be categorised in different ways according to Linda Senden.<sup>288</sup> For example, action programmes created by the Commission and adopted by the Council are preparatory and informative instruments.<sup>289</sup> Some researchers also include green and white papers issued by the Commission amongst the informative instruments, and qualify them as soft law.<sup>290</sup> In particular Communications published by the Commission are informative instruments that are addressed at wider public including other institutions, private stakeholders and civil society.

In addition interpretative and decisional instruments, whose role is to interpret primary or secondary EU law, are also called ‘communications’.<sup>291</sup> Generally, interpretative communications are issued by the Commission and other EU institutions.<sup>292</sup> Decisional instruments are decisional guidelines, codes and frameworks that are also issued by the Commission. Their objective is to support rulemaking in areas where the Commission assists Member States.

Another form of soft law are steering instruments such as Council declarations, joint declarations, inter-institutional agreements and Council resolutions,<sup>293</sup> as are Council and Commission ethical codes of conduct or practice. The Code of Good Administrative Behaviour, which was adopted by the Commission on 13<sup>th</sup> September 2000 and which applies to Commission staff in their dealings with the public is an example of regulation of self-regulation after the scandals of the Santer Commission in

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<sup>288</sup> Senden, L. (2004), *Soft Law in European Community Law*. Portland and Oregon: Bloomsbury, pp. 124-132.

<sup>289</sup> Van Vooren, B. (2012), *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for coherence*. London and New York: Routledge. pp. 181-182.

<sup>290</sup> Senden, L. (2005), ‘Self-Regulation and Co-Regulation in European Law: Where Do They Meet?’ *Electronic Journal of Comparative Law*, 9(1), pp. 1-26.

<sup>291</sup> Olsen, E. B. and Sørensen, E. K. (2006), *Regulation in the EU*. Copenhagen: Thomson. pp. 179 – 184.

<sup>292</sup> Senden, L. (2005), ‘Self-Regulation and Co-Regulation in European Law: Where Do They Meet?’ *Electronic Journal of Comparative Law*, 9(1), pp. 1-26.

<sup>293</sup> Diedrichs, U., Reiners, W., and W. Wessels (2011), *The dynamics of change in EU governance*. Cheltenham, UK: Edward Elgar. pp. 26-26.

1999.<sup>294</sup> In this case, soft-law is used by the Commission to regulate itself and constitutes a European form of self-regulation and reflexive governance of EU law and policy.

### **An analysis of EU Anti-Corruption Report as reflexive governance**

In the final section of this chapter, seven components of the theories of reflexive governance and reflexive law discussed above will be applied in analysing the EU Anti-Corruption Report as a form of reflexive governance. The seven components are collective learning, active participation, global interaction, innovative problem-solving, proceduralism, soft law and regulation of self-regulation.

The first component of reflexive governance, 'collective learning', is a key characteristic of the Report. One of its main aims is to support different actors to engage in learning best practice from each other. Curial information for collective learning is provided in the section classified as 'the main findings of the EU Anti-Corruption Report'. This section of the Report analyses the state of corruption in all EU Member States and identifies sectors vulnerable to corruption. For example urban development and construction are sectors identified in the Report as being vulnerable to corruption in some Member States. In response to the risk of corruption in these areas, the EU Anti-Corruption Report suggests that Member States establish a specialised prosecution service. In addition the Report finds that environmental planning is an area vulnerable to corruption in some Member States where granting of planning permits, particularly for large-scale projects, has been affected by allegations. Another sector is healthcare that the EU Anti-Corruption Report finds vulnerable to corruption, especially regarding procurement and the pharmaceutical industry. Further sector in which the EU Anti-Corruption Report identifies serious problems in some Member States is tax administration.

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<sup>294</sup> Topan, A. (2002), 'The Resignation of the Santer-Commission: The Impact of 'Trust' and 'Reputation'. *European Integration online Papers (EIoP)*, Vol. 6. pp. 1-14.

Finally, the Report highlights in its thematic chapter the risks with corruption in public procurement in all of the Member States. It suggests a far-reaching anti-corruption agenda to tackle corruption in public procurement that covers politics, banking, police, local government and other corruption-related sub-sectors.

By identifying areas that are vulnerable, the EU Anti-Corruption Report suggests learning from negative experience. Furthermore, collective learning is supported by the EU Anti-Corruption Report by offering indicators of corruption that poses a direct risk in vulnerable sectors. Good practices are presented as sources of inspiration for collective learning. An example of best practices in the area of ‘Financing of Political Parties’, that is advocated by the EU Commission is Finland which has a ‘well-regulated and transparent funding system’. It can serve as a best practice in the EU from which other Member States can learn in improving their own regulation of political party financing.

An area of successful collective learning from best practice is preventative policies according to the Report. The Commission singles out the Netherlands and its ‘public sector integrity’ initiative as the best model to promote integrity in the public sector with the aim of preventing corruption in public administration. The EU Commission suggests that other Member States can collectively learn from the Netherlands model to reform their own policies and regulations to promote higher integrity in the public sector.

The EU Commission also mentions a number of anti-corruption agencies that the EU has assisted in being established. They include ‘The Slovenian Commission for Prevention of Corruption’, ‘The Romanian National Anti-Corruption Directorate’, ‘The Latvian Bureau for Prevention and Combating of Corruption’, ‘Spanish specialised anti-corruption prosecution office’ and ‘The Croatian Bureau for Combating Corruption and Organized Crime’. These agencies are examples of sharing best practice that the EU Commission in the EU Anti-Corruption Report suggests for other Member States to reflect on when designing their own anti-corruption policy.

Member States that were recommended in the EU Anti-Corruption Report to establish or enhance their anti-corruption agencies are encouraged to assess the experience and models of agencies mentioned above as best practice suggested by the EU Commission for establishing an effective anti-corruption organisation.

The best practices strategy of the Commission can be interpreted as a form of reflexive governance by which the Report provides a platform for learning between different levels of governance, in which participants are able to actively engage and participate in dialogue and experimentation, thereby engaging in a process of learning.

The second component of reflexive governance, ‘active participation’ is a key element of reflexive governance approach. For collective learning to occur, active participation must take place at domestic, regional, and local level. This component of reflexive governance focuses in particular on civil society to get involved in policymaking, and is viewed as key for active participation of a different range of actors. Reflexive governance differs in this respect from the New Governance approach where the Commission and Member States are the main actors that participate in the process as active participants in developing a certain policy. In other words, the active participation concept requires that the Commission is shifting responsibilities to develop anti-corruption policy and measurements to lower levels.

The central concern with ‘active participation’ is widely evident in the EU Anti-Corruption Report, as the overall goal of the Report is to involve a wide range of participants from the governmental and non-governmental sectors in shaping policies, laws and regulations at EU, Member State, regional and local level. This feature of the Report is evidence for its concern with reflexive governance. It does not impose standards but encourages actors to revisit and redefine their interests and actions through ongoing deliberative processes.

A good example of support of active participation – in particular, shifting responsibilities to local level - can be identified in the thematic chapter of the EU Anti-Corruption Report. The risk of public procurement at regional and local levels is addressed and the EU Anti-Corruption Report finds that public procurement at regional and local levels raises particular issues where local authorities have wide discretionary powers that are not matched with sufficient checks and balances mechanisms. Furthermore, the Report finds that, in some regions and municipalities, a strong network of clientele around small interest groups were developed. The Report shows that, in some Member States, local administrations have developed their own anti-corruption action plans. The Report also shows that, in a few cases, civil society initiatives have had a beneficial effect on the accountability of local administrations with regard to transparency of public spending. Thus, from a reflexive governance theory perspective, the active participation - in particular, shifting responsibilities to local level – occurs, in particular local experimentation.

The EU Anti-Corruption Report recommends two best practices from Member States' local government own initiatives. The first example is the 'Slovakia Open Local Government Initiative'. The Report suggests that the Slovakia Open Local Government Initiative is an external monitoring of public spending mechanisms in Slovakia, which is run by Transparency International that ranks 100 Slovak towns according to a set of criteria based on transparency in public procurement, access to information, availability of data of public interest, public participation, professional ethics and conflicts of interests. The second example is the German model, which has developed 'guidelines for prevention of corruption in public procurement at local level'. The EU Anti-Corruption Report singles out the 'Brochure on the Prevention of Corruption in Public Tendering', jointly approved by the German Association of Towns and Municipalities and the Federal Association of Small and Medium-Sized Building Contractors. The Brochure provides an overview of preventive measures against corruption in public procurement at the level of towns and municipalities. The objectives of this German initiative are to enhance codes of conduct to

regulate sponsorship and acceptance of gifts, establishing centralised authorities for public tenders, increasing the use of e-procurement, exclusion of enterprises found guilty of corruption offences and establishing black lists/corruption registers.

From a reflexive governance perspective, these two examples can be understood as attempts of the EU Anti-Corruption Report in supporting local experimentation and active participation at local and regional level in order to develop instruments that can prevent and fight corruption effectively. The Report presents two examples of successful local initiatives that other Member States can learn from and adopt to their own local initiatives to fight corruption.

Reflexive governance in form of support of active participation also characterises the processes that led to the introduction of the EU Anti-Corruption Report itself. There was a wide range of actors that participated in the establishing of the EU Anti-Corruption Report. These included the EU Commission, Member States, government officials, non-governmental organisations, civil society and academia. The most prominent examples of active participation were two occasions in the process of preparing the Report in form of two regional workshops. The first regional workshop took place in Sofia, Bulgaria on 10-11 December 2012, and the second regional workshop took place in Gothenburg, Sweden on the 5th March 2013. In both workshops there were representatives from the DG Home Affairs, representatives from each of the Member States' national authorities, civil society, independent experts and groups of experts selected by the EU Commission, academia, NGOs, journalists and business representatives. All of the participants came from a wide variety of backgrounds and engaged actively in supporting and consulting the Commission in preparing the EU Anti-Corruption Report. Thus, the process of creating the Report was a result of reflexive governance in the form of active participation.



The third crucial component, ‘global interaction’, is another key element of reflexive governance. It emphasises the importance of global challenges for local, national and supranational efforts. Corruption as well as anti-corruption has to be understood as a result of the increasingly global and highly integrated world society and its economy. The global interaction component of the theory of reflexive governance is also evident in the EU Anti-Corruption Report in viewing its response to fight corruption as part of global efforts.

The EU Anti-Corruption Report, as illustrated in Chapter 2, is part of a global response to improve legal regulation and policies of anticorruption. The Report acknowledges the influences of international bodies such as GRECO, UN and the OCED on its design and content. The EU Anti-Corruption Report is itself a response to pressures on the European Union and its Member State governments to pay closer attention to informal and corrupt practices after the 2008 global financial crisis. For example, the EU Anti-Corruption Report is a means to implement the UN convention against corruption known as UNCAC. In the light of the economic challenges both in Europe and elsewhere, stronger guarantees of integrity and transparency of public expenditure were seen as necessary after the global financial crisis of 2008. In surveys and opinion polls conducted in research preparing for the Report, citizens responded that they expect the EU to play an important role in assisting Member States after the global financial crisis and the Euro crises to protect their economy against organised crime, financial and tax fraud, money laundering and corruption. The EU Anti-Corruption Report indicates that the responses by citizens to implement international anti-corruption initiatives were positive, especially in times of economic crisis and budgetary austerity.

Another example of global interaction in the EU Anti-Corruption Report is the use of international indicators, corruption indices and, in particular, the Transparency International CPI index. The EU Anti-Corruption Report makes use of the CPI index published by Transparency International, firstly to understand the ranking of each of the Member States and, secondly, the

sectors that are perceived to be mostly affected by corrupt practices. From reflexive governance perspectives, the EU Anti-Corruption Report uses global instruments such as the Transparency International CPI index to prepare some of the policy objectives of the EU Anti-Corruption Report and to double check their own research, in particular the Special Eurobarometer and the business-focused flash survey. The involvement of international indicators such as the CPI index is another example where the EU Anti-Corruption Report engages in global interaction, a key component of reflexive governance.

The open acknowledgment of the EU Anti-Corruption Report that it is an anti-corruption instrument in response to global efforts fighting corruption is an indication of reflexive governance. The EU Anti-Corruption Report is thereby making a valuable contribution to strengthening global efforts in fighting corruption. Furthermore, it engages in reflexive governance insofar as it makes Member States aware of opportunities and obligations in the global fight against corruption.

The fourth element of the theory of reflexive governance, ‘innovative problem-solving’, also characterises the governance approach of the Report. This is true in relation to evaluation of existing capacities in order to create new solutions to policy shortcomings and enhancing instruments to improve regulations, policy, training, technology and knowledge transfer between Member States. The EU Anti-Corruption Report suggests that Member States find innovative solutions in two additional ways; by learning from best practices from other Member States and by creatively implementing international standards in fighting corruption. In fact, the Report itself can be seen as a mutual experience-sharing programme to develop innovative tools to prevent corruption practices.

The EU Anti-Corruption Report encourages in particular finding innovative solutions in fighting corruption in public procurement, a very important area for the EU economy, as approximately one fifth of the EU’s GDP is spent every year by public entities. The Report itself calls for stronger

integrity standards in the area of public procurement and suggests improvements in control mechanisms in a number of Member States. The detailed information and specific points suggested for further improvement are suggested in each of the country chapters as explained in Chapter 2. The main section suggests that the EU Anti-Corruption Report should raise awareness of the rules among all public procurement actors and promote a culture of integrity in public service. Thus, from a theory of reflexive governance point of view, the EU Anti-Corruption Report supports Member States to reflect on their shortcomings and introduce innovative new tools and instruments to promote integrity in public service. Research shows<sup>295</sup> that Member States are testing new ways and use technology to better collect and analyse data in order to improve public procurement governance, thus ensuring a better collection of data on procurement. Member States are using technology and innovative tools to establish contract registries for public procurement contracts, to establish public procurement irregularities databases based on remedies and audits, to develop anomalies detection tools, and to ensure interconnectedness between public procurement data and public and business registries and EU funds databases. A good example of innovative use of technology in the Member States is the introduction of an e-procurement system. The EU Commission aims for all the Member States to have an e-procurement system in place by 2018, which ultimately will help to reach the EU Anti-Corruption Report objectives to promote a higher culture of integrity in public service, as well as reducing corruption in the area related to public procurement. The EU Anti-Corruption Report has suggested for the improvement of integrity in public service also at local and regional government.

In addition to the four key components of reflexive governance mentioned and identified above, the EU Anti-Corruption Report is innovative in terms of reflexive law. Its approach is characterised by proceduralism, use of soft law and regulation of self-regulation. These features are used in order to

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<sup>295</sup> European Parliament (2015), eGovernment: Using technology to improve public services and democratic participation. EPRS | European Parliamentary Research Service Author — PE 565.890.

support Member States to enhance their anti-corruption policies, laws, programmes and agendas to fight corruption.

There are signs that the Report takes seriously the paradigm shift towards deliberation as a form of regulation. It uses insights of the theory of reflexive law on 'proceduralism' that express a new understanding of law in modern society. Proceduralism supports the idea that a broader range of actors is involved in the process of policymaking. The main insight of proceduralism, offered by the theory of reflexive law, relates to the function of procedure and procedural requirements in structuring participation.

The importance of participatory procedure can also be detected in the creation of the Report. In its preparation, a procedure was followed that involved a group of experts from a wide variety of backgrounds to advise the EU Commission. In addition, a network of research correspondents collected and processed information from each of the Member States. Furthermore, the Commission held expert meetings with the participation of national authorities, researchers, NGOs, journalists and business representatives. Proceduralism guaranteed the involvement of civil society and that civil society actors become part of the process in preparing the EU Anti-Corruption Report. Furthermore, proceduralism characterises the structure and the process of dialogue between the Commission, Member States and civil society, as well as the involvement of different actors that go beyond the EU Commission and national authorities, and include the findings of civil society in the Report.

Proceduralism also typifies the organisation of the Report itself. Procedural devices are the biannual cycle of the EU Anti-Corruption Report and the request of the Member States to respond to the recommendations and outstanding issues that the EU Anti-Corruption Report mentions. The Member State response is expected to take the form of a national action plan. A number of Member States, including the UK and Romania, have already adopted an anti-corruption national action plan, with a clear timetable and procedures as to what each sector should do in enhancing

measurements and regulations to address corruption and irregular practices more effectively.

Overall, the nature of the EU Anti-Corruption Report is characterised by proceduralism. The procedure for regulation by dialogue used in the Report is not dissimilar to the procedure and the technique of the OMC and new governance in general. The Report is in fact a monitoring instrument that observes and reports on the level of corruption and on the measures to fight it in each of the Member States.

Another sign of the reflexivity of the governance approach of the EU Anti-Corruption Report is the choice of 'soft law' as its main legal instrument. The EU Anti-Corrupting Report does not operate with legally binding 'hard law'. Instead it favours soft law instruments, well known in international and European law, such as 'codes of conduct', 'guidelines', 'communications' and other non-treaty obligations. Reference to these forms of soft law can be found throughout the Report, including the national chapters, the thematic chapter on public procurement and in particular the recommendations issued for each Member State.

The choice of Recommendation as the main legal instrument in conducting a dialogue with the Member States is one of the clearest indication of the reflexive governance nature of the Report. Recommendations are suggestions for the Member States to take action but are not automatically binding. However, they are instruments of governance because they aim at closer cooperation and coordination among the Member States within the EU. In addition to promotion and coordination of national policies, they also aim at contributing to the establishment of anti-corruption as a policy field at supranational level. The EU Anti-Corruption Report itself is a major stepping-stone in the construction of this policy field.

The final component, 'regulation of self-regulation', is probably the key concept offered by the theories of reflexive governance and reflexive law. It captures the overarching approach to governance taken in the Report. Ralf

Rogowski, in his account of reflexive law, suggests that reflexive legal regulation means that legal regulation has to transform itself so that it becomes capable of facilitating self-regulation in other systems. This means, in practical terms, the development of new forms of law that allow law to assist self-regulation.

The way regulation of self-regulation operates in practice can be demonstrated in relation to how the recommendations of the EU Anti-Corruption Report were generated. In the first instance Member States were asked to identify their anti-corruption policy shortcomings and engage with the EU Commission in writing up their own recommendations in the Report. The recommendations that were finally issued for each of the national chapters were officially written by the EU Commission but followed closely the reports of each of the Member States. In practice the EU Commission was inviting Member States to reflect on their own policy shortcomings in addressing the issue of corruption and write their own recommendations in the EU Anti-Corruption Report. Thus, the recommendations of the Report are truly reflexive as they just mirror self-identified problems and thereby become part of self-regulations of Member States.

In summary, the seven components of the theory of reflexive governance can all be found and are characterising the governance approach of the EU Anti-Corruption Report. Overall, the main aim of the EU Anti-Corruption Report is regulation of self-regulation by actively supporting Member States in creating and conducting their own anti-corruption policies. The theory of reflexive governance can show that the governance approach of the EU Anti-Corruption Report is not just new governance, but reflexive in its nature because it consciously aims at creating a European anticorruption policy through supporting and strengthening Member State anticorruption policies.

## **Chapter 4**

### **4.1 Introduction**

This chapter discusses first findings on the impact and achievements of the EU Anti-Corruption Report in its first two years of operation. The insights are derived from three case studies on the United Kingdom, Romania and Albania and the chapter is accordingly divided into three parts. The first part on the UK illustrates the recommendations that the EU Anti-Corruption Report made for the UK and how the UK has implemented the recommendations into concrete policy actions. It also evaluates to what extent the UK engages in reflexive governance in developing its anti-corruption policy field and the interplay with the EU in enhancing its anti-corruption policy. The second part on Romania explains the recommendations of the EU Anti-Corruption Report for Romania and comments on the EU approach towards Romania and the anti-corruption policy reforms that Romania has implemented prior and after accession, with a particular focus on the post-accession instrument known as the Cooperation and Verification Mechanisms. Furthermore it analyses the efforts Romania has made in implementing the recommendations of the EU Anti-Corruption Report and to what extent Romania makes use of reflexive governance in establishing its anti-corruption policy field. The third part on Albania analyses the steps this country has taken in developing an anti-corruption policy field. It distinguishes three phases in the development of anti-corruption policy after the downfall of the communist regime. It evaluates the assistance of the EU to support Albania in its efforts in establishing an anti-corruption policy field and asks whether the interaction between the EU and Albania reveals forms of reflexive governance.

## **4.2 The United Kingdom**

### **4.2.1 The EU Anti-Corruption Report for the United Kingdom**

The EU Anti-Corruption Report country chapter for the United Kingdom suggests several steps for the UK to take into consideration in addressing the issue of corruption more effectively. The EU Anti-Corruption Report highlights that the UK does not have any issues concerning petty corruption. The UK has made positive steps in encouraging companies to not get involved in corruption acts and preventing bribing officials overseas through good practice guidelines, and rigorous legislation, most nobly under the Bribery Act 2010.

Historically, the UK has a long lasting tradition in promoting and advocating for high ethical standards in public service and addressing corruption. However, the EU Anti-Corruption Report suggested that more rigorous efforts are necessary in addressing the risks of corruption in some sectors. The EU Anti-Corruption Report recommends that the UK needs to establish more effective measurements to prevent and address the potential risks of foreign bribery in particular. The Report encourages the UK to establish sector-specific guidelines to companies in areas that might be at higher risk of being exposed to corrupt acts, particularly in the defence sector. In addition, the EU Anti-Corruption Report suggested that further steps must be taken to ensure more transparent and dissuasive sanctions in out-of-court settlements.

In the light of the banking and large cooperative scandals in the UK prior to 2014, the EU Anti-Corruption Report suggested that the UK needs to further strengthen its accountability of the governance of banks. Those features, including more enforcement of the sanctions when wrongdoing occurs and the UK should ensure that the beneficial owners of UK registered companies are fully declared. The steps suggested by the EU Anti-Corruption Report are observed as important for the UK in order to tackle bribery and corruption within its financial sector, which came under



high scrutiny after the criticisms that the Financial Services Authority received and its subsequent abolition that came in April 2013.

The EU Anti-Corruption Report finds that the United Kingdom needs to pay more attention to encourage higher standards of integrity for elected officials and address political corruption. Furthermore, the EU Anti-Corruption Report suggested that the UK needs to take additional efforts to cap down donations to political parties, impose limits on electoral campaign spending and ensure practical monitoring instruments in overseeing, and prosecution of potential violations of campaign spending. The EU Anti-Corruption Report also suggested that the UK needs to consider lowering the thresholds for the reporting of financial holdings and for the registration of received gifts for public office holders. Furthermore, the EU Anti-Corruption Report suggested that the UK provides clear guidelines on what is and what is not acceptable as gifts for Members of Parliament.

Finally, the EU Anti-Corruption Report suggested that the UK has to carefully address the issues classified by the Leveson Inquiry concerning the legitimate collaboration between the press and the police. The EU Anti-Corruption Report suggested that there must be a clear time limit set by the UK for the employment of former police officers by the media industry. In the sections below, there will be a further illustration of the current regulation and legislation on areas selected by the EU Anti-Corruption Report.

#### **4.2.2 Political Corruption in the United Kingdom**

The EU Anti-Corruption Report finds that the UK needs to pay additional attention to political corruption. The EU Anti-Corruption Report suggested that the UK has to take additional steps in capping down donations to political parties and encourage higher integrity for elected officials. Furthermore, the EU Anti-Corruption Report suggested that the UK could make further efforts to limit the electoral campaign spending and develop a practical monitoring instrument to supervise any violations of campaign

spending. In addition, the EU Anti-Corruption Report finds that there must be a clearer time limit set when former public officials can be employed by the media industry.

The issue of party finance that the EU Anti-Corruption Report suggested that the UK has to improve is a complex issue and it has been debated to great length on how to reform it in the UK political discourse. Sir Hayden Phillips, in his comprehensive review of party finance found that, in the last 20 years, there has been an intermittent but persistent debate about how to reform the funding of political parties.<sup>296</sup> Furthermore, this debate must be reflected in a wider perspective based on the ongoing changes in the environment of the political parties according to Johnston and Pattie.<sup>297</sup> Johal, Moran and Williams's study of the post 2008 financial crisis discovered that the continuous crisis of party funding in the UK has opened a window to allow financial interests to have a strong influence in the parties.<sup>298</sup> On the other hand, the Committee on Standards in Public Life found that all parties require their leaders to spend time soliciting those individuals or organisations for the funds they need in order to survive.<sup>299</sup> If one may reflect upon the context of the financial crisis and more general paradigms raised by the Committee on Standards in Public Life findings, it is somewhat straightforward to come to the notion that this dependency cannot be beneficial for democracy.<sup>300</sup> As a result, political finance in the UK may be hinted through the lens of institutional corruption.

Also the EU Anti-Corruption Report suggests dependency as an issue, but it is important to ascertain the degree to which dependency causes harm. In

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<sup>296</sup> VanHeerde-Hudson, J and J. Fisher (2013), 'Parties heed (with caution): Public knowledge of and attitudes towards party finance in Britain', *Sage Journals Party Politics*, **19**(1), pp. 41-60.

<sup>297</sup> Johnston, R and C. Pattie (2007), 'Funding Local Political Parties in England and Wales: Donations and Constituency Campaigns,' *British Journal of Politics and International Relations* **9**(3), pp. 365 -395.

<sup>298</sup> Sukhdev, J. and, M. Moran and K. Williams (2015), 'Power, Politics and the City of London after the Great Financial Crisis', *Journal of Government and Opposition*, **49**(3), pp. 400-425

<sup>299</sup> Committee on Standards in Public Life (2011), *Political Party Finance: Ending the Big Donor Culture*. Thirteenth Report (Cm 8208 London, Nov), p. 105.

<sup>300</sup> Committee on Standards in Public Life (2011), *Political Party Finance: Ending the Big Donor Culture*. Thirteenth Report (Cm 8208 London, Nov), p. 105.

Fisher's account this is not always clear, but rather ambiguous regarding party election spending, because even though there is evidence that levels of campaigning are noticeably linked with turnout,<sup>301</sup> the paradigm suggesting that political party spending has an encouraging effect on electoral prosperities is difficult to prove.<sup>302</sup> On the basis that the electoral result of spending appears somewhat ambiguous, one might reason that fundraising is not basically such a significant activity for parties after all. However, the opposite argument is supported by the fact that a yearly donation of £50,000 to the Conservative Party confers membership of the so-called Leader's Group, with a right to meet the Party leader - at the time David Cameron and other senior figures from the Conservative Party at dinners, post-Prime Minister's Questions lunches, drinks receptions and important election events.<sup>303</sup> From this position, it is clear that there exists a disparity that arises from a party's need to secure funding. However, it raises serious questions about the possible favouritism that might involve in return to these generous donors.

However, the actual harm caused by dependency which is the concern of the EU Anti-Corruption Report might not be the most problematic issue. As Lawrence Lessig notes, once a dependence is established, even perfectly benign behaviour could become corruption in the form of trading of influence.<sup>304</sup> Despite a significant legislative overhaul in 2000 by the Political Parties, Elections and Referendums Act, the public in the UK remains concerned about the dependence of the parties on donors.<sup>305</sup> In Johnston and Pattie's account, this concern relates to the possibility, if not actual influence, that donors may have on party policies and

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<sup>301</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, p. 405

<sup>302</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, p. 405

<sup>303</sup> Watt, H (2015), 'The Tory Leader's Group donor club: 'A chance for like-minded people to talk'. *The Guardian*. Retrieved from: <https://www.theguardian.com/politics/2015/may/04/tories-leaders-group-donor-club-david-cameron-conservatives-dinners>

<sup>304</sup> Lessig, L (2013), 'Institutional Corruptions', *Edmond J. Safra Working Papers*, No. 1, p. 15.

<sup>305</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, p. 405

programmes.<sup>306</sup> In other words, the likely possibility of having an unhealthy dependency, just as the EU Anti-Corruption is concerned among the political parties in the UK, is a sufficient ground to not trust in the political system. In this view, institutional corruption occurs within the UK political system and, as a consequence, has an influence in key economic processes. This weakens the effectiveness of an institution and also weakens the public's trust of the institution.<sup>307</sup>

In 2000, the Political Parties, Elections and Referendums Act was adopted to regulate party finance in the UK. The 2000 Act established for the first time an electoral commission, regulation of donations and limited election spending.<sup>308</sup> Since the Act was adopted, various amendments have been made to the PPERA, particularly in response to a scandal in 2006. Where it appeared that political parties had been receiving loans at lower than commercial rates as a way of avoiding requirements to declare donations, in exchange for which it was claimed by some of the loan donors to be put forward as nominations for peerages. In Fisher's account, the House of Lords appointments committee rejected all nominations. Nevertheless, the loans for peerages were succeeded by a lengthy and expensive police investigation, but eventually no charges were made.<sup>309</sup> Following from this scandal, regulations were amended to include loans in the classification of regulated donations.

The examples above show that campaign spending limits have been a long-standing and dominant feature of British political finance long before the EU Anti-Corruption Report was introduced. According to Ewing's observations, a dual role to these limits could be found; firstly, as a policy for dealing with electoral corruption, and secondly as a method of

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<sup>306</sup> Johnston, R and C. Pattie (2007), 'Funding Local Political Parties in England and Wales: Donations and Constituency Campaigns,' *British Journal of Politics and International Relations* 9(3), pp. 365 -395.

<sup>307</sup> Lessig, L (2013), 'Institutional Corruptions', *Edmond J. Safra Working Papers, No. 1*, p. 15.

<sup>308</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, p. 405-407.

<sup>309</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, pp. 405-407.

encouraging equality of electoral opportunity.<sup>310</sup> If the first of these two functions is based on the basis of old governance regulations against individual corruption, it appears that the second needs additional attention. Fisher presents the potential significance of spending limits by supporting that uncontrolled funds are superior to any other form of resources that go into political life.<sup>311</sup> This is because money could acquire almost all of the resources that are given by the electorate.

Alongside spending caps, transparency is also another key issue of the British Political establishment, which also the EU Anti-Corruption Report indirectly mentions. According to guidelines from the Electoral Commission, the Political Parties and Elections Act 2009 asks that political parties declare all donations or loans of more than £7,500.<sup>312</sup> According to Fisher, only three donations of over £1 million were made with a further five over £100,000. Fisher found that the top three Conservative donors accounted for almost £8.5 million.<sup>313</sup> Edmond J. Safra Centre for Ethics' research on the Electoral Commission's database found that there were 46 donations, excluding those from public funds of over £100,000 made to the three main political parties.<sup>314</sup> It is not really clear if these two research findings are comparable in order to suggest an increase in large gifts over time, but it is a clear indication that the dependence of the Conservative Party on large individual donors went from three in 2001 to eight in 2011, compared with only one individual donating to the Labour Party and none to the Liberal Democrats.<sup>315</sup>

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<sup>310</sup> Keith Ewing, Jacob Rowbottom, J and T. Joo-Cheong (2012), *The Funding of Political Parties: Where Now?*, New York: Routledge, pp. 256 – 257.

<sup>311</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, p. 405

<sup>312</sup> The Electoral Commission (2010), Donations and Loans: Guidance for Regulated Donees in Great Britain. Retrieved from: [http://www.electoralcommission.org.uk/\\_data/assets/electoral\\_commission\\_pdf\\_file/0019/13708/026-regulated-donees-guidance-final.pdf](http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0019/13708/026-regulated-donees-guidance-final.pdf)

<sup>313</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, p. 405

<sup>314</sup> Lessig, L (2013), 'Institutional Corruptions', *Edmond J. Safra Working Papers, No. 1*, p. 15.

<sup>315</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, p. 405

### 4.2.3 Implementing a Donation Cap in the UK

The discussion of campaign spending ceilings, voluntarism in party income and a lack of regulation generally to party finance has been dominant in UK political finance for over a century and the suggestion in the EU Anti-Corruption Report for a donations cap is a reiteration of what the general debate is in the UK.<sup>316</sup> However, after the introduction of PPERA in 2000, the discussion of increased regulation has been more central to the UK agenda in addressing the issue. For example, while Fisher found that more comprehensive proposals, such as far-reaching state funding would have been less likely to obtain support in 2000 when the PPERA was adopted.<sup>317</sup> The latest Thirteenth Report of the Committee on Standards in Public Life notes that the only safe way to eliminate big money from party funding is to put a cap on donations, set at £10,000.<sup>318</sup> All the same, some agreement on a £50,000 cap had even been reached but later collapsed in October 2007. It could be noticed that such a £50,000 cap would have been significantly higher than in most other systems that limit donations.<sup>319</sup>

The EU Anti-Corruption Report rightly makes the case for a cap in party donations. However, for the UK to agree on such issues raises some important issues. One of the key challenges for reaching agreement on a cap on donations is how to replace the lost funds in order that the parties maintain their capability to achieve their roles in the political system. As a general suggestion for the possibility of eliminating large donations, parties would increase their democratic base by increasing their efforts to involve more political supporters. However, this could provide some compensation, but a cap could mean that parties could reach far more comprehensively

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<sup>316</sup> Paul Heywood, P (2015), *Routledge Handbook of Political Corruption*. London and New York: Routledge, pp. 3-9.

<sup>317</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, p. 405

<sup>318</sup> Committee on Standards in Public Life (2011), *Political Party Finance: Ending the Big Donor Culture*. Thirteenth Report (Cm 8208 London, Nov), p. 105.

<sup>319</sup> Committee on Standards in Public Life (2011), *Political Party Finance: Ending the Big Donor Culture*. Thirteenth Report (Cm 8208 London, Nov), p. 105.

from state funding.<sup>320</sup> The Committee on Standards in Public Life supports such a shift of caps and has estimated the cost of replacing the lost funding at around £23 million per annum, equivalent to approximately £50 million per elector per year.<sup>321</sup> This figure seems to be fairly modest if it decreases the dependence of political parties on third-party donors and subsequently improves public trust in the institution of government. In other words, such changes would in turn reduce and eliminate institutional corruption.

#### 4.2.4 Integrity in Elected officials

The EU Anti-Corruption Report suggested that the UK should increase further the integrity of elected officials. Traditionally, the UK has been considered as having in place high standards of ethics and integrity within public life. Almond and Verba stated that the UK enjoys the model of a civic culture for fairness, impartiality, consensual with active and educated citizens contributing in public life.<sup>322</sup> Integrity and ethical standards in public life in the UK were considered to be a model standard, because many scandals have in fact been isolated from the public. They were dealt quietly and have been isolated by the public such as the historical cases of Stanley in 1948, Profumo in 1963 and Poulson in 1972.<sup>323</sup> The UK made a strong commitment in establishing high ethical standards and integrity amongst its public office holders, and in particular the civil servants are mostly noted for their commitment to core values of integrity, objectivity, honesty and independence. This is imbedded in the hallmarks of a professional system following the 1854 Northcote-Trevelyan report.<sup>324</sup> The ‘Haldane model’, based on the eponymous 1918 report, supported the development of close

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<sup>320</sup> Fisher, J. D. Denver, and J. Benyon (2015), *Central Debates in British Politics*. London and New York: Routledge, pp. 405-407.

<sup>321</sup> Committee on Standards in Public Life (2011), *Political Party Finance: Ending the Big Donor Culture*. Thirteenth Report (Cm 8208 London, Nov), p. 105.

<sup>322</sup> Paul M. Heywood, M.P (2012), ‘Integrity management and the public service ethos in the UK: patchwork quilt or threadbare blanket?’, *International Review of Administrative Sciences*, **78**(3 pp. 474-493.

<sup>323</sup> Heywood, P. M and J. Rose (2015), ‘Curbing Corruption or Promoting Integrity? Probing the hidden conceptual challenge’, In P. Hardi, P.M. Heywood and D. Torsello (eds), *Debates on Corruption and Integrity: Perspectives from Europe and the US*. Basingstoke Palgrave Macmillan, pp.102-119.

<sup>324</sup> Morgan, O. K (2010), *The Oxford History of Britain*, Oxford: Oxford University Press, p. 546.

relationships between civil servants and ministers' departments. Even so, the constitutional convention held into account mainly the ministers for all their ministry's actions, the development of expert parliamentary select committees after 1945 began to also hold other public officials to account over policy matters.<sup>325</sup>

Lord Adonis described in his account that the UK is widely seen as the model of the non-corrupt industrial democracy.<sup>326</sup> Nonetheless, this observation has come under increasing scrutiny as a series of political scandals have unfolded in recent years. That said, most of these scandals have been coterminous with the development of what Hood and Lodge have characterised the 'civil service reform syndrome',<sup>327</sup> a development that originated under the Conservative administration of 1979–97, and continued with the Labour administration of 1997–2010. However, since the MPs' expenses scandal, the UK is perceived to be more corrupt in its political system. The report by Transparency International reveals that UK crashed dramatically from 11<sup>th</sup> to 20<sup>th</sup> in the league table of countries perceived to be the cleanest in the world after the scandal was revealed.<sup>328</sup> The MPs' expenses scandal was considered to be one of the most controversial Parliamentary events of its modern times. A recent report on UK corruption by Transparency International UK revealed that the British public views political parties to be the most corrupt sector in the UK, and Parliament to be the third most corrupt sector. These events had a profound impact on public perceptions of MPs and led to the Parliamentary Standards Act 2009.<sup>329</sup>

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<sup>325</sup> Jones, P and P. Tickner (2016), *Fraud and Corruption in Public Services*. London and New York: Routledge, p. 250-252.

<sup>326</sup> Auby, J. B, Breen, E. and Thomas Perroud (2014), *Corruption and Conflicts of Interest: A Comparative Law Approach*. Cheltenham, Edward Elgar Publishing Ltd, p. 88.

<sup>327</sup> Rhodes, R (2015), 'Recovering the Craft of Public Administration', *Public Administration Review*, 76(2), pp. 638–647.

<sup>328</sup> Transparency International (2009), National Integrity Systems TI Country Study Report United Kingdom 2009. London: TI-UK.

<sup>329</sup> House of Commons Committee on Members' Expenses, (2012), The operation of the Parliamentary Standards Act 2009: First Report of Session 2010-12. Volume 2.



Historically, the UK's parliament had a high reputation and the UK was placed well in international corruption indices. However, the numerous scandals lately in the UK have indicated serious faults in the political system, growing particular concerns about the regime for parliamentary expenses, lobbying of politicians by those who could buy access that can influence legislation, policy decisions and spending priorities. The political corruption scandals in recent years in the UK have lowered public confidence in not just those individual politicians that were involved, but also in political institutions as a whole. The danger is that the public will start to cease respecting the decisions made by Parliament and government as legitimate and fair. This exemplifies a serious threat to UK democracy.<sup>330</sup>

Thus, the EU Commission recommends in the EU Anti-Corruption Report that the UK should address the issue of increasing the integrity of public officials. The debate in British public life has many elements and they concern conflicts of interest, trading of influence, party finance and post-employment of office-holders. Most of the time, the debate and the literature evaluate the issues of ethics and integrity in the UK. The EU Anti-Corruption Report takes up these issues and reflects to the UK, thereby supporting ongoing efforts of reforming and strengthening public standards.

#### **4.2.5 UK attitude to Ethics**

Ethics are generally defined as a set of principles that provide a structure for appropriate action in accordance with that set of principles. Ethical issues in the UK are perceived to be those issues that are distinct from law, politics or society, that are concerned with right and wrong activities, and outcomes for the organizations or individuals and that they work for.<sup>331</sup> Recent history in the UK has experienced various examples of unethical

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<sup>330</sup> Paul M. Heywood, M.P (2012), 'Integrity management and the public service ethos in the UK: patchwork quilt or threadbare blanket?', *International Review of Administrative Sciences*, **78**(3) pp. 474-493.

<sup>331</sup> Little, G and D. Stopforth (2013), 'The Legislative Origins of the MPs' Expenses Scandal', *The Modern Law Review*, **76**(1), pp. 83-108.

behaviour, from the scandals implicating property development and local authority contracting in the 1960s, the so-called Poulson Affair to more modern event concerns with ‘cash for questions’ that saw the end of the Conservative government in 1997, thus leading to the establishment of the Committee on Standards in Public Life and the drafting of the Principles of Public Life, the so-called Nolan Principles.<sup>332</sup>

It is important to define the discussion about ethics in the UK, as it helps to understand the discussion about corruption in politics. Political behaviours are culturally and socially defined in different ways in different local, national or international settings. Some national cultures see certain forms of political behaviour as corrupt acts, such as patronage and clientelism, while others see these as acceptable instruments of political association. Even so, there can be value clashes within societies that might constitute different acts as unethical or even corrupt. This is because values might change over time and the values of the public might change as to what is acceptable or not. This has also occurred in the case of the UK. In the last fifteen years, the public responded to a series of questionable acts of parliamentarians and the increasingly high concern by the public and the media, have led the UK to reform standards of public behaviour. However, such a process has not been as straightforward or fully effective as the EU Anti-Corruption suggests.

Acts that are seen as unethical in the UK include acts such as harassment or bullying. Huberts, Pijl, and Steen in their account classify as unethical behaviour acts that violate the integrity of a public office holder if their behaviour contained acts that can fall under fraud, corruption, theft, conflicts of interest, improper use of authority, misuse of information and discrimination. However, it is not always clear as to what might constitute unethical behaviour, as it sometimes also falls under the classification of being illegal or inappropriate behaviour. Thus, there is frequent overlap as ethical issues are regulated by legislation. Furthermore, what might be seen

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<sup>332</sup> Bew, P (2015), ‘The Committee on Standards in Public Life: Twenty Years of the Nolan Principles 1995–2015’, *Political Quarterly Journal*, **86**(3), pp.411-418.

as unethical behaviour varies among cultures and states. For example, there still exist grey areas between what constitutes a gift or a bribe, despite numerous legislative attempts to define borderlines. As is shown for the UK in the EU Anti-Corruption Report, a clear list is needed as to what constitutes a gift and what the Members of Parliament cannot accept as gifts.

The discussion raised above of when does a gift become a bribe, raises complex issues of cultural relativity, especially in the context of the EU with its 27 Member-States representing a large variety of national and cultural diversity. However, there are also common problems that are only given particular meanings locally. In other words, inequality or injustice are common problems that occur in different forms at local level. This is manifested when developing codes of conduct for government ministers, MPs, civil servants and judges. Most codes of conduct include a register of interests, either as an important part of the code or as a separate document. Such a register of interests exists to ensure transparency, mainly where there might be possible conflicts of interest.<sup>333</sup> This issue was also included in the EU Anti-Corruption Report for the UK. Therefore, the gifts that have to be registered include those given to family members. However, classifying family can be difficult and complex. For instance, the family members might not benefit from the post or position of the registree. In a Western perspective family members mean the partner and children of the registree, and those who live in the same home. In other cultures, the notion of the family is not only extensive, but it is probable that the head of the family will seek to favour those extended members. Therefore, it would be unrealistic to expect one homogeneous culture or set of principles to be applied across all administrations in the UK that is fast becoming multicultural.<sup>334</sup>

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<sup>333</sup> Auby, J. B, Breen, E. and Thomas Perroud (2014), *Corruption and Conflicts of Interest: A Comparative Law Approach*. Cheltenham, Edward Elgar Publishing Ltd, p. 88.

<sup>333</sup> Rhodes, R (2015), 'Recovering the Craft of Public Administration', *Public Administration Review*, 76(2), pp. 638–647.

<sup>334</sup> Auby, J. B, Breen, E. and Thomas Perroud (2014), *Corruption and Conflicts of Interest: A Comparative Law Approach*. Cheltenham, Edward Elgar Publishing Ltd, p. 88.

#### 4.2.6 Foreign bribery in the United Kingdom

The EU Anti-Corruption Report for the UK suggested that the UK has to take further preventive measurements to effectively address risks of foreign bribery. Furthermore, the EU Anti-Corruption Report suggested that the UK should consider developing sector-specific guidelines to companies in areas that could be at increased risk. That said, the UK has implemented the OECD convention on combating bribery of foreign public officials and it has implemented the most recent legislation in its history which was recommended by the OECD, the UK Bribery Act 2010, which addresses the risk of foreign bribery. The UK's Bribery Act is a broad amendment of all UK bribery statutes and it applies to foreign as well as domestic bribery.

The UK Bribery Act has broader territorial jurisdiction and it is built upon the most extensive foreign act prior to date, which was the US Foreign Corrupt Practices Act of 1977 (FCPA). The UK Bribery Act applies to bribery and corruption in both the public and private sectors. Furthermore, it also penalises acts that facilitate payments and corporate offences of failing to prevent bribery by someone carrying out the services on behalf of a commercial cooperation. Under the UK Bribery Act, it is a strict liability offence. Its implementation created a responsibility to implement, preserve and enforce effective anti-bribery policies and procedures. Moreover, groups that pay a bribe will be liable for a bribe paid on their behalf, except if they can prove that they had applied sufficient procedures designed to prevent bribery. The bribery of foreign public officials is also a punishable offence and the Act contains specific offences for senior company officials of agreeing to or overlooking bribery. Under European legislation, companies sentenced due to an offence of fraud, bribery or money laundering are excluded from tendering for public contracts.

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<sup>334</sup> Rhodes, R (2015), 'Recovering the Craft of Public Administration', *Public Administration Review*, 76(2), pp. 638–647.

The UK Bribery Act 2010 received Royal assent in April 2010 and entered into force in July 2011.<sup>335</sup> The legislation implements the UN Convention against Corruption 2003. It replaces a number of out of date statutes in England and Wales, Northern Ireland and Scotland, which also include the Public Bodies Corrupt Practices Act 1889, Prevention of Corruption Act 1906 and 1916. In addition, it also repeals the provisions contained in part 12 of the Anti-Terrorism, Crime and Security Act 2001<sup>336</sup> relating to bribery of foreign public officials and abolishes the common law offence of bribery.

The UK Bribery Act was established to improve the UK anti-corruption regulations and laws in order to prevent the risk of bribery by UK businesses around the world.<sup>337</sup> The UK Bribery Act's extraterritorial jurisdiction has more far reaching implications for UK businesses, companies, their subsidiaries and supply chains. In addition to criminalising bribery, the legislation has made a new offence of failing to prevent bribery. However, a business can escape possible prosecution if they can prove that it carried out sufficient procedures to prevent the possibility of bribery. All the same, the UK does not have a satisfactory record of prosecuting cases of bribery in international business. This raises some questions if this legislation does not put enough pressure on UK businesses. They also leave the responsibility of fighting bribery to less resourced business associates and supply chains in emerging countries to tackle the issues related to corruption and bribery.<sup>338</sup>

The Bribery Act designed two general offences of bribery: an offence of bribery of foreign public official and an offence of failure by a business to prevent bribery being conducted on their behalf. Section 1 of the UK

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<sup>335</sup> Maton, J (2010), 'UK Bribery Act 2010', *Employee Relations Law Journal*, **36**(3), pp. 37-45.

<sup>336</sup> Anti-Terrorism, Crime and Security Act 2001, pp. 108-110, Retrieved from; [www.legislation.gov.uk/ukpga/2001/24/pdfs/ukpga\\_20010024\\_en.pdf](http://www.legislation.gov.uk/ukpga/2001/24/pdfs/ukpga_20010024_en.pdf)

<sup>337</sup> Yanga, L.M (2014), 'UK Bribery Act 2010: implications for business in Africa', *International Journal of Law and Management*, **56**(1), pp. 3-28.

<sup>338</sup> The International Bar Association (2009), Report of the Task Force on Extraterritorial Jurisdiction, IBA Legal Practice Division, London. Retrieved from; <http://tinyurl.com/taskforce-etj-pdf>

Bribery Act<sup>339</sup> creates the offence of bribing another, and Section 2 of the UK Bribery Act<sup>340</sup> creates the offence of being bribed. Section 6 of the UK Bribery Act<sup>341</sup> creates the offence of bribing a foreign public official and Section 7 of the UK Bribery Act<sup>342</sup> creates a new offence of failing to prevent bribery. The UK Bribery Act does make a definition of bribery explicitly, but it does explain the actions as being believed to constitute an act of bribery. This means that there are essentially two definitions of bribery set out in Sections 1, 2 and 6. The first requires the intention to induce or reward inappropriate conduct and the second does not. Thus, it has an implication for profitable organisations in prepare appropriate procedures and policies, since one has clear criminal implications and the other does not. Nonetheless, there is no clarification in the UK Bribery Act as to why the same offence of bribery can be committed under such different conditions. Gift-giving, hospitality and facilitation payments made by organisations or their agents and other liaisons acting on their behalf are prohibited.<sup>343</sup>

The UK Bribery Act enforces penalties on individuals and business organisations found guilty of bribery offences. Under Sections 1, 2 and 6 an individual is liable on conviction to imprisonment for a maximum term of twelve months, or a monetary fine, and in some cases to both. On indictment, an individual could face up to ten years' imprisonment. Under Section 7 of the UK Bribery Act organisations can be liable to unlimited fines by the authorities. The Bribery Act does not accept civil remedies.<sup>344</sup> What is interesting about this part of the legislation is that it provides a legal defence for a commercial organisation, if it can show that it had proper procedures in place to prevent bribery being made on their behalf. In addition, the UK Bribery Act provides a legal defence for bribery

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<sup>339</sup> Bribery Act 2010 (c.23) Section 1: Offences of bribing another person

<sup>340</sup> Bribery Act 2010 (c.23) Section 2: Offences relating to being bribed

<sup>341</sup> Bribery Act 2010 (c.23) Section 6: Bribery of foreign public officials

<sup>342</sup> Bribery Act 2010 (c.23) Section 7: Failure of commercial organisations to prevent bribery

<sup>343</sup> Yanga, L.M (2014), 'UK Bribery Act 2010: implications for business in Africa', *International Journal of Law and Management*, **56**(1), pp. 3-28.

<sup>344</sup> Yanga, L.M (2014), 'UK Bribery Act 2010: implications for business in Africa', *International Journal of Law and Management*, **56**(1), pp. 3-28.

committed in relation to the intelligence services or armed forces shown that there are arrangements in place to ensure that such action is necessary for the purpose of persons carrying out these tasks.<sup>345</sup>

The Secretary of State for Justice, under section 9 of the UK Bribery Act, is mandated to publish guidelines about procedures that commercial organisations can put in place to prevent bribery.<sup>346</sup> The guidelines do not suggest any specific procedure and there is no regulatory framework to monitor compliance. It simply sets out six general risk-based principles that are made to be flexibly in order to let the organisations make their own appropriate guidelines and procedures. The guidelines do not impose any direct obligation on organisations. The principles are as follows:

#### 4.2.7 Risk-based principles for preventing bribery

Principle 1	Proportionate procedures
Principle 2	Top level commitment
Principle 3	Risk assessment
Principle 4	Due diligence
Principle 5	Communication (including training)
Principle 6	Monitoring and review

Source: Ministry of Justice<sup>347</sup>

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<sup>345</sup> Harrison, K and N. Ryder (2016), *The Law Relating to Financial Crime in the United Kingdom*. London and New York: Routledge, p. 142.

<sup>346</sup> Ministry of Justice (2011), Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010), Response to Consultation CP11/10 (CP(R) 7/11), Retrieved from; [www.justice.gov.uk/consultations/docs/bribery-response-consultation.pdf](http://www.justice.gov.uk/consultations/docs/bribery-response-consultation.pdf)

<sup>347</sup> Ministry of Justice (2011b), Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010), Response to Consultation CP11/10 (CP(R) 7/11), Retrieved from; [www.justice.gov.uk/consultations/docs/bribery-response-consultation.pdf](http://www.justice.gov.uk/consultations/docs/bribery-response-consultation.pdf)

The above principles seem to represent an approach to the design of anti-bribery procedures and for policies of compliance purposes. However, from a legal perspective, there are some concerns with both the guidelines and the substance of the law. The respondents of the International Bar Association, in the discussion about the guidance, note that the principles do not contain the rule of law, a fundamental legal principle which is essential for effective enforcement and legislative control.<sup>348</sup> Its presence would enable commercial cooperation to be more effective in fighting corruption. Furthermore, the UK Bribery Act appears to lack suitable substance. In particular, in Section 6 of the UK Bribery Act, the penalty of criminality is too low. As there is no need for any element of unforeseen intent in order for an offence to be committed under Section 6 of the UK Bribery Act, any expenditure intended to promote a business's goods or services, whether small or large, might be criminalised.<sup>349</sup> Although the Serious Fraud Office has suggested that prosecutors will use their own discretion to ensure that only those abusing corporate hospitality and marketing will be pursued, such flexible measures do not stipulate the necessary legal conviction.<sup>350</sup> Thirdly, business organisations are going to face problems in drafting clear procedures and policies that will be compliant with the Bribery Act, as the wording of the Bribery Act prohibits such expenditure. Regardless of prosecutorial discretion, any promotional expenditure relating to a foreign public official would, in any case, breach Section 328 of the Proceeds of Crime Act 2002, except when a business gets consent from the Serious Organised Crime Agency, which is very unlikely and impractical.<sup>351</sup>

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<sup>348</sup> IBA (2010), *Risks and Threats of Corruption and the Legal Profession*, International Bar Association, Joint Report by IBA, OECD and UNODC.

<sup>349</sup> IBA (2010), Response of the Working Group of the International Bar Association (IBA) Anti-Corruption Committee to the Ministry of Justice Consultation on Guidance About Commercial Organisations Preventing Bribery.

<sup>350</sup> FSA (2012), *Financial Services Authority (FSA) Anti-Bribery and Corruption Systems and Controls in Investment Banks*, FSA/PN/035/2012, Retrieved from; [www.fsa.gov.uk/static/pubs/other/anti-bribery-investment-banks.pdf](http://www.fsa.gov.uk/static/pubs/other/anti-bribery-investment-banks.pdf)

<sup>351</sup> Guidance on Proceeds of Crime Act 2002 (POCA) money laundering provisions, pp. 7-8, Retrieved from; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257962/30-poca.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257962/30-poca.pdf)



#### 4.2.8 Bribery of foreign public officials

Section 6 of the Bribery Act 2010 cites that a person who bribes a foreign public official indirectly or directly with intent to obtain or maintain business or take an advantage in the conduct of business is to be found guilty of an offence of bribery. The bribe might be given in the form of an agreement of a financial exchange or other advantage to encourage the official to omit the performance of his or her public functions or influence the performance of a role. The Bribe Payers Index (BPI) 2011<sup>352</sup> ranked the UK 8<sup>th</sup> out of the 28 leading economies whose businesses are least anticipated to pay bribes overseas. The BPI score is on a scale from 0 to 10. A high score suggests that the likelihood of companies from that country engaging in overseas bribery is low. The UK's BPI was 7.9, 8.6 and 8.3 during 2006, 2008 and 2011, respectively.<sup>353</sup> However, there is a suggestion that UK businesses often use bribes to circumvent national laws and regulations by bribing foreign public officials to get contracts or speed up the processes of the services that they are demanding. They allegedly pay bribes to officials in customs and tax revenue authorities, police, the judiciary, registry and permit offices.<sup>354</sup> They cite the TI-UK Report, where 30% of directors in the UK reported that their businesses used liaisons to avoid anti-corruption laws abroad.<sup>355</sup> These claims are supported by various high profile cases involving UK businesses including the famous 'British Aerospace Systems' defence contracts around the world including Saudi Arabia, Tanzania and South Africa, the Lesotho Highlands Water Project in Southern Africa and TSKJ Consortium in Nigeria.<sup>356</sup> The main argument is

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<sup>352</sup> The Bribe Payers Index (BPI) 2011, Retrieved from;

[http://issuu.com/transparencyinternational/docs/bribe\\_payers\\_index\\_2011/31?e=0](http://issuu.com/transparencyinternational/docs/bribe_payers_index_2011/31?e=0)

<sup>353</sup> Transparency International (2013), 'Business principles for countering bribery', TI-UK, Retrieved from;

[http://www.transparency.org/whatwedo/publication/business\\_principles\\_for\\_countering\\_bribery](http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery)

<sup>354</sup> Horder, J and P. Alldridge (2013), *Modern Bribery Law: Comparative Perspectives*. Cambridge: University of Cambridge Press, pp. 128-159.

<sup>355</sup> Transparency International (2013), 'Business principles for countering bribery', TI-UK, Retrieved from; [http://www.transparency.org/whatwedo/publication/business\\_principles\\_for\\_countering\\_bribery](http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery)

<sup>356</sup> Yanga, L.M (2014), 'UK Bribery Act 2010: implications for business in Africa', *International Journal of Law and Management*, **56**(1), pp. 3-28.

that there is a poor record of the UK prosecuting bribery cases in international business.

The cases Serious Fraud Office investigates and prosecutes are of foreign bribery related cases except for defence related contracts, because they are the dealt by the Ministry of Defence. This division has developed a conflict of interest as observed by the BAE (British Aerospace) Systems case.<sup>357</sup> The company was investigated for false accounting and alleged bribery. The Saudi Arabia case was eventually dropped on the grounds of national security interest. This was despite the fact that the OECD Convention on bribery mentioned that prosecution must not be dropped due to national security reasons.<sup>358</sup> One justification was that a shortage in the law made it problematic to determine corporate criminal liability, as there needed to be a directing connection of the business involved in the corrupt act. There were also theories that investigations were withdrawing due to lack of political will and blackmail.<sup>359</sup> Whereas in the Tanzanian case, it was argued that that restitution cannot be made since there were no victims of crime. Leaving aside these allegations, BAe continues to attain contracts from foreign governments.<sup>360</sup> The Director of the SFO put forward an insightful question that reflects a deeper underlying socio-economic motivation in the way that governments prosecute and settle cases of corruption: What is the right approach for a prosecutor dealing with a prosecution of a corporation while recognising that, behind the corporation lie employees, pensioners, customers, families and others whose livelihood depends upon the corporation?<sup>361</sup>

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<sup>357</sup> Lord, N (2014), *Regulating Corporate Bribery in International Business: Anti-corruption in the UK and Germany*. London and New York: Routledge, pp.182.

<sup>358</sup> Lord, N (2014), *Regulating Corporate Bribery in International Business: Anti-corruption in the UK and Germany*. London and New York: Routledge, pp.182

<sup>359</sup> Fletcher, C and Daniela Herrmann (2012), *The Internationalisation of Corruption: Scale, Impact and Countermeasures*. London and New York: Routledge, pp.144.

<sup>360</sup> Fletcher, C and Daniela Herrmann (2012), *The Internationalisation of Corruption: Scale, Impact and Countermeasures*. London and New York: Routledge, pp.144.

<sup>361</sup> Yanga, L.M (2014), 'UK Bribery Act 2010: implications for business in Africa', *International Journal of Law and Management*, **56**(1), pp. 3-28.

Therefore, the UK's foreign policy on international corporations has been mostly impractical and insufficient in fighting corruption. The lack of implementation of anti-corruption measurements in the UK is also reflective of the strong corporate lobby in pursuit of international trade and the government's plea for less regulation. Although the UK is a signatory to a number of regional anti-corruption and international conventions, the UK has not strengthened their importance by establishing its own strategies to support these measurements and such also reflects on the EU anti-corruption report. A report by the Foreign and Commonwealth Office cited that one of the UK's international priorities is to help UK businesses to win contracts in foreign markets and lobby against regulatory and political barriers.<sup>362</sup> Corporations are encouraged to self-regulate using voluntary measurements and guidelines such as the UN Global Compact's tenth principle against corruption, the International Chamber of Commerce rules against extortion and bribery and the Extractive Industry Transparency Initiative. The UK considered them to be examples of best practice.<sup>363</sup> The government makes a case that these voluntary measurements and guidelines play a significant role in trying to discover innovative solutions to problems preventing corruption and other issues encountered by international businesses from working in diverse business environments.<sup>364</sup>

The OECD has been critical about the UK's reluctance to prosecute bribery offences referring to outdated laws, vague fragmentation of investigative and genuine efforts, and overlapping powers.<sup>365</sup> Besides, the SFO, the City of London Overseas Crime Unit and Serious Organised Crime Agency all deal with overseas corruption and money laundering cases. In addition, the OECD also showed concerns about the UK's lack of experts and

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<sup>362</sup> McCourquodale, R. and P. Simons (2007), 'Responsibility beyond borders: responsibility for extraterritorial violations by corporations of international human rights law', *Modern Law Review*, **70**(4), pp. 598-625.

<sup>363</sup> Yanga, L.M (2014), 'UK Bribery Act 2010: implications for business in Africa', *International Journal of Law and Management*, **56**(1), pp. 3-28.

<sup>364</sup> Berinde, M. and A. Andreescu (2013,) 'Business Ethics Implementation In The Organizational Culture Of Companies.' *Annals of the University of Oradea Economic Science Series*, **22**(1), pp. 44-53.

<sup>365</sup> Fletcher, C and Daniela Herrmann (2012), *The Internationalisation of Corruption: Scale, Impact and Countermeasures*. London and New York: Routledge, pp. 129-130.

transparency in dealing with bribery cases. From 1997 to 2008, the UK had not investigated a single case of bribery of foreign public officials.<sup>366</sup> The first conviction was made in 2009. Under enormous pressure, the government issued the Foreign Bribery Strategy 2010 that set out how the government planned to address and administer the growing challenges of enforcement and establish a clear legal, regulatory and policy framework for action against foreign bribery.<sup>367</sup> The Bribery Act is part of the legislative reforms towards meeting these challenges. The White Economic Crimes Agency was set up to improve implementation and enforcement efforts. Even so, it's mandate is to pay mainly attention to economic issues.<sup>368</sup>

#### **4.2.9 Improving the Accountability in the Governance of Banks**

The EU Anti-Corruption Report for the UK suggests briefly that the UK should further strengthen the accountability of governance in banks, including stricter enforcement and implementations. The financial crisis of 2008 exposed significant shortcomings in governance within banks and the culture and behaviour, which underpinned it within the system in the UK. As a result, in June 2012 the Parliamentary Commission on Banking Standards (PCBS) was appointed to conduct an inquiry into the professional standards and culture within the UK banking sector. The Commission was appointed as a result of the London Interbank Offered Rate rigging scandal, which was followed by the financial crisis and a series of high-profile conduct failures within the UK banking industry.

The Parliamentary Commission on Banking Standards published its findings and recommendations on 19<sup>th</sup> June 2013. The report highlighted many shortcomings and, in its conclusion, stressed that a lack of

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<sup>366</sup> Fletcher, C and Daniela Herrmann (2012), *The Internationalisation of Corruption: Scale, Impact and Countermeasures*. London and New York: Routledge, pp. 129-130.

<sup>367</sup> Berinde, M. and A. Andreescu (2013,) 'Business Ethics Implementation In The Organizational Culture Of Companies.' *Annals of the University of Oradea Economic Science Series*, **22(1)**, pp. 44-53.

<sup>368</sup> Van Erp, J. Huisman, W. and G. Vande Walle (2015), *The Routledge Handbook of White-Collar and Corporate Crime in Europe*. London and New York: Routledge, p. 94.

accountability contributed heavily to the mismanagement of key risks and led to public distrust in the industry. The PCBS made a number of recommendations in relation to improving individual accountability in the banking sector which were incorporated into the Financial Services (Banking Reform) Act 2013. At the same time, the Financial Conduct Authority and the Prudential Regulation Authority also released a joint consultation on the implementation of new remuneration rules (FCA/PRA CP15/14), which seeks to introduce changes to structure. The regulators see the two consultations as a package that will reinforce the trend of greater responsibility and accountability across the financial and banking industry.

The collapse of financial institutions, followed subsequently by the spread of the financial crisis, triggered the policy-makers to re-examine the supervision of banks and to develop more accountability for the restoration of financial stability.<sup>369</sup> At an international level since 2008, there has been a lot of emphasis and work put into addressing the causes of the financial crisis and the supervisory shortcomings.

In 2007 in the UK, the financial crisis started with the unexpected failure of Northern Rock, and spread throughout the UK banking system. This resulted in the collapse of a number of other financial institutions, the bail out of the Royal Bank of Scotland, the acquisition of HBOS bank by Lloyds, amongst other things came as a result of failures of the financial system.<sup>370</sup> The turmoil of the banking and financial sector led to an understanding that there is a loophole in the overall structure of financial regulation.<sup>371</sup> Thus, the regulatory reform for banking and finance was placed on top of the political agenda in the UK. In 2010, the newly elected Coalition Government revealed its strategies for a broad overhaul of the regulatory structure and put forward an ambitious programme for reforms,

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<sup>369</sup> Ryder, N. Turksen, U and S.Hassler (2015), *Fighting Financial Crime in the Global Economic Crisis*, London and New York: Routledge, pp. 16-18.

<sup>370</sup> Ryder, N. Turksen, U and S.Hassler (2015), *Fighting Financial Crime in the Global Economic Crisis*, London and New York: Routledge, pp. 16-18.

<sup>371</sup> Financial Services Act 2012, Explanatory Notes, para 3, quoting from the Government publication:  
The Coalition: Our Programme for Government

hoping to prevent potential crises for the future and restore public confidence.

The adoption of Financial Services Act 2012 was the UK's official response as the result of the crises occurred, which came into force on the 1st April 2013.<sup>372</sup> The new legislation saw the split of the Financial Services Authority (FSA) into two separate authorities: the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). In addition, a new committee, the Financial Policy Committee (FPC), was established within the Bank of England (BoE) in order to perform macro-prudential oversight functions.<sup>373</sup>

#### **4.2.10 A review of the failures of the financial system**

The Labour Government that came into power after the 1997 elections announced its objective to engage in a radical reform of the financial services regulatory structure that would strip the Bank of England of its supervisory responsibilities.<sup>374</sup> Subsequently, this led to the introduction of the FSA, which became the UK's single regulator. Thus, the Treasury, the BoE and the FSA mutually shared responsibility for financial stability in the UK.<sup>375</sup> The Bank of England Act 1998 and the Financial Services and Markets Act 2000 (FSMA) gave the legal bases on which this multilateral regulatory structure was certified. The joined roles of the three institutions were imbedded in a Memorandum of Understanding (MoU) that made the background structure for co-operation between the three institutions in

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<sup>372</sup> Kokkinis, A (2013), 'The Financial Services Act 2012: The Recent Overhaul of the United Kingdom's Financial Regulatory Structure', *International Company and Commercial Law Review*, **24**(9), pp. 325-328.

<sup>373</sup> Bilbao-Ubillos, J (2014), *The Economic Crisis and Governance in the European Union: A Critical Assessment*. London and New York: Routledge, pp. 39-42.

<sup>374</sup> Bilbao-Ubillos, J (2014), *The Economic Crisis and Governance in the European Union: A Critical Assessment*. London and New York: Routledge, pp. 39-42.

<sup>375</sup> Financial Services and Markets Act 2000 (2015), Memorandum of Understanding between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority. Retrieved from: <http://www.bankofengland.co.uk/about/Documents/mous/statutory/moumarket.pdf>

order to achieve the common objective of financial stability.<sup>376</sup> The Bank of England was responsible for keeping the stability of the monetary and financial system. The Treasury was responsible for supervising the multilateral organisation of the three institutions' regulatory framework and for authorising support operations in case of a potential crisis with responsibility for sagacious supervision, in addition to conducting business aspects in assigned to the FSA.<sup>377</sup>

It was observed at the time that the consolidated model of supervision and regulation would be a model for improving the dynamics within the financial services sector. The arrangement and overlap of practicality and conduct of business regulatory goals, rather than the distinction amongst them, made strong claims that the joint regulatory structure was the most appropriate model in resolving effectively and efficiently situations of ambiguous objectives.<sup>378</sup> Thus, coordinated institutions were considered to be more efficient to evaluate the big picture of the financial industry, and increase effectiveness by preventing duplicated support functions.<sup>379</sup> However, post 1997 the climate of financial stability was steady and the UK's approach to regulation was considered important in making the UK's financial markets prosperous at the time.

However, a decade later, during the 2008 crisis the whole financial system was put to test and it was found to be inadequate. The extensive mandate of the FSA, which included both prudential regulation and conduct of business, was evidenced to be too ambitious to be efficient.<sup>380</sup> The financial crisis showed that assigning financial regulation of the entire financial system in the hands of one institution led to failings of numerous

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<sup>376</sup> Kaufman, G. and R. Bliss (2012), *Financial Institutions and Markets: The Financial Crisis: An Early Retrospective*. New York: Palgrave Macmillan, pp. 94 -111.

<sup>377</sup> Kaufman, G. and R. Bliss (2012), *Financial Institutions and Markets: The Financial Crisis: An Early Retrospective*. New York: Palgrave Macmillan, pp. 94 -111.

<sup>378</sup> Gordon, N. J. and P. Davies (2016), *Principles of Financial Regulation*. Oxford, Oxford University Press, pp. 513-514.

<sup>379</sup> Gordon, N. J. and P. Davies (2016), *Principles of Financial Regulation*. Oxford, Oxford University Press, pp. 513-514.

<sup>380</sup> Dewing, I. and P. Russell (2016), 'Whistleblowing, Governance and Regulation Before the Financial Crisis: The Case of HBOS', *Journal of Business Ethics*, **134**(1), pp.155-169.

objectives. Conduct of business supervision became the top priority of the FSA and this was done at the expense of prudential supervision.<sup>381</sup>

In addition, there were serious problems with macro-prudential analysis. Such a lack of macro-prudential strategy and the failure to utilize macro-prudential instruments to detect systemic risks that occurred according to Turner were ‘far more important to the origins of the crisis than any specific failure in supervisory process relating to individual firms.’<sup>382</sup> Also, the FSA’s approach to macro-prudential supervision was rather unclear. It was mainly dependent on tick box compliance with regulations, while an adequate in-depth and strategic analysis which is key in terms of the effectiveness of prudential regulation was put on the sidelines, consequently leading to significant loopholes.<sup>383</sup>

The crisis highlighted the significant weakness of the coordinated system as a whole, rather than the FSA.<sup>384</sup> The multilateral agreement was upheld to have numerous inherent failings in dealing with the financial crisis.<sup>385</sup> The system’s successful stability was mainly dependent upon a robust cooperation between the FSA, the BoE and the Treasury. During the financial crisis, it became clear that the association between the three organisations was not working sufficiently. The triple authorities did not have a defined management structure and there were difficulties in respect to the communication amongst the three institutions. Furthermore, among the most significant shortcomings of the triple structure was that the Bank could exercise a veto authority over the Treasury’s recommended programs, thus making coordinated action between the Bank and the Treasury

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<sup>381</sup> Dewing, I. and P. Russell (2016), ‘Whistleblowing, Governance and Regulation Before the Financial Crisis: The Case of HBOS’, *Journal of Business Ethics*, **134**(1), pp.155-169.

<sup>382</sup> Joanna, G. and O. Akseli (2011), *Financial Regulation in Crisis?: The Role of Law and the Failure of Northern*. Cheltenham: Edward Elgar, pp. 80 – 82.

<sup>383</sup> McPhilemy, S (2013), ‘Formal Rules versus Informal Relationships: Prudential Banking Supervision at the FSA Before the Crash’, *New Political Economy*, **18**(5), pp. 748-767.

<sup>384</sup> Clayton, N. (2013), ‘An Overview on the Inconsistencies of Approach in Regulating the Capital Position of Banks: Will the United Kingdom Step out of Line with Europe?’, *Journal of Banking Regulation*, **14**(2), pp. 107-33.

<sup>385</sup> Clayton, N. (2013), ‘An Overview on the Inconsistencies of Approach in Regulating the Capital Position of Banks: Will the United Kingdom Step out of Line with Europe?’, *Journal of Banking Regulation*, **14**(2), pp. 107-33.



difficult.<sup>386</sup> Therefore, the three institutions did not operate as collaboratively as they could have.

Furthermore, the actual structure of the multilateral arrangements between the bodies was flawed; the FSA, which was the authority to supervise individual banks was different from that of the Bank of England, the institution having the necessary funds and means to act as the lender of last option upon a possible failure of a particular bank. Thus, as the Bank had legislative responsibility for financial stability, it had inadequate instruments to deliver on them.<sup>387</sup>

The Chancellor of the Exchequer at the time, Darling, noted that the problem was that the system had been operating for over a decade in good terms and it was not anticipated that there would be a crisis.<sup>388</sup> The financial system was thought to be operating effectively during the ten years that preceded the financial crisis. The Bank of England had focused mainly on its monetary policy duties, and even though it was in charge of supervising the financial stability, it never seemed necessary for the Bank to understand the dangerous relationships within the Banking system. At the same time, the FSA had mainly focused its concern with consumer issues instead of observing the systemic risks, while the Treasury had not considered financial regulation as a main priority.<sup>389</sup>

It would be inadequate to say that the failing of the tripartite system was the main reason why the banking crisis occurred. Most experts argued that the roots of the crisis have a global origin - particularly due to the global economic imbalances, the failure to understand and assess risk, the

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<sup>386</sup> HM Treasury (2011), A new approach to financial regulation: building a stronger system. Retrieved from: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/81411/consult\\_newfinancial\\_regulation170211.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81411/consult_newfinancial_regulation170211.pdf)

<sup>387</sup> Darling, A (2012), *Back from the Brink: 1000 days at number 11*. London: Atlantic Books, p.20.

<sup>388</sup> Darling, A (2012), *Back from the Brink: 1000 days at number 11*. London: Atlantic Books, p.20.

<sup>389</sup> Darling, A (2012), *Back from the Brink: 1000 days at number 11*. London: Atlantic Books, p.20.

continuing figures of debt across the financial system, as well as the failure to guarantee capital liquidity.<sup>390</sup> Certainly, there were major shortcomings in the way the tripartite system treated the causes of the crisis and these failures have significantly contributed to the magnitude of the crisis. If a different regulatory model would have been in place, it is very questionable whether it might have coped with such enormous forces.<sup>391</sup>

#### **4.2.11 UK responses to the EU Anti-Corruption Report**

In assessing the UK, the first analysis that can be drawn in this case study is that the EU's efforts in supporting anti-corruption policy in the UK is very different to Romania and Albania, as well as the degrees of relationship with the European Union.

The interplay between the European Union and the UK in developing anti-corruption policy is different to other EU Member States insofar as the EU mostly supports the UK's efforts in developing their own anti-corruption policy without demanding importing separate standards. This assessment is also reflected in the recommendation that the EU Commission has recommended to the UK in the EU Anti-Corruption Report.

The topics that the EU Commission has recommended in the EU Anti-Corruption Report for the UK all concern ongoing efforts of developing a coherent anticorruption strategy in the UK. These include the risks of foreign bribery and providing sector-specific guidelines to companies in areas that might be at increased risk, strengthening accountability in the governance of banks, capping donations to political parties and providing guidance on acceptable gifts for Members of Parliament and implementing

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<sup>390</sup> Gordon, N. J and P. Davies (2016), *Principles of Financial Regulation*. Oxford, Oxford University Press, pp. 513-514.

<sup>391</sup> Gordon, N. J and P. Davies (2016), *Principles of Financial Regulation*. Oxford, Oxford University Press, pp. 513-514.

the Leveson Inquiry recommendation on the limits on the employment of former police officers by the media.<sup>392</sup>

In December 2014 the UK responded to most of the recommendations made in the EU Anti-Corruption Report by introducing the UK's first ever 'UK Anti-Corruption Plan'. The UK Anti-Corruption Plan for the first time introduces the UK's anti-corruption efforts under one cross-departmental national action plan for the next two years.<sup>393</sup> However, it is important to mention that the UK enhanced its efforts of fighting corruption not only by responding to the recommendations made in the EU Anti-Corruption Report, but by also responding to global as well as civil society demands, in particular demands made by Transparency International in 2011 to develop an Anti-Corruption National Action Plan.<sup>394</sup> In reflexive governance perspective, the EU Report had an amplifying effect on the UK in making commitments to address corruption in many policy fields that go beyond those mentioned in the recommendations of the EU Anti-Corruption Report.

The UK Anti-Corruption Plan represents an important step forward in the UK's efforts to fight corruption. It reveals political will to acknowledge corruption as a serious threat. The UK Anti-Corruption Plan was well-received and civil society organisation TI-UK has given a qualified welcome to the launch of the first ever UK Anti-Corruption Plan, which is a 60-page document containing 66 Actions. The UK Anti-Corruption Plan recognised in its content the threat corruption poses to the UK's economy as well as to society, thus shifting the long-standing narrative in which the research shows above that corruption happens only overseas but not much in the UK. The content of the UK Anti-Corruption Plan has managed to

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<sup>392</sup> European Commission (2014), *Annex 28: United Kingdom to the EU Anti-Corruption Report*, COM (2014) 38 final.

<sup>393</sup> HM Government (2014), *The UK Anti-Corruption Plan*, pp. 10 – 56. Retrieved from; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388894/UK\\_antiCorruptionPlan.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UK_antiCorruptionPlan.pdf)

<sup>394</sup> Transparency International UK (2011), *Corruption in the UK: Overview and Policy Recommendations*, 4-volume Report 'Corruption in the UK', pp. 16 – 26. Retrieved from, <http://www.transparency.org.uk/publications/corruption-in-the-uk-overview-policy-recommendations/>

establish a coordinated strategy to tackle corruption by drawing widely on findings from several government departments, law enforcement agencies, business community and civil society research – especially from Transparency International UK.

Thus, it can be said that the UK has responded positively to the recommendations of the EU Anti-Corruption Report in taking concrete action. The steps taken by the UK reflect successful reflexive governance in form of regulation of self-regulation. In a Report issued by the UK Government in May 2016 on the progress of the UK Anti-Corruption Plan, concrete steps were shown in implementing the 66 actions that the UK Anti-Corruption Plan set out in which 62 actions having been delivered thus far.<sup>395</sup> In regard to the recommendations that the EU Anti-Corruption Report made to the UK, they are fully integrated throughout the different priorities in the UK Anti-Corruption Plan. The Report issued for the progress made in the implementation of the UK Anti-Corruption Plan, as will be shown below have mostly been delivered, in particular those recommendations suggested by the EU Anti-Corruption Report.

The Home Office has established a new offence of ‘police corruption’, which came into force on 13<sup>th</sup> April 2015. This offence, carrying a maximum penalty of 14 years imprisonment, makes it an exclusive offence for a police officer.<sup>396</sup> Here, the UK has taken some steps in the recommendations made by the Leveson inquiry to regulate in some form police corruption, which were also supported in the EU Anti-Corruption Report. However, regarding the time limits on the employment of former police officers by the media has had yet to clearly outline in the next follow up report. The other recommendation concerns the conduct of Members of Parliament on registration of received gifts, and provides clear guidance on

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<sup>395</sup> HM Government (2016), *Progress Update on the UK Anti-Corruption Plan*, pp. 2 – 7. Retrieved from;  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522802/6.1689\\_Progress\\_Update\\_on\\_the\\_UK\\_Anti-Corruption\\_Plan\\_v11\\_WEB.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522802/6.1689_Progress_Update_on_the_UK_Anti-Corruption_Plan_v11_WEB.PDF)

<sup>396</sup> Home Office (2015), *Annual Report and Accounts 2014-15*, pp. 9. Retrieved from,  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/441284/HO\\_AR\\_14-15\\_print.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441284/HO_AR_14-15_print.pdf)

acceptable gifts; the UK Anti-Corruption Plan progress report suggests that the House of Commons approved the revised Guide to the Rules relating to the conduct of Members on 17<sup>th</sup> March 2015.<sup>397</sup> Furthermore, the UK has taken steps in ensuring that the beneficial owners of UK-registered companies are declared, which was also a brief recommendation of the EU Anti-Corruption Report. The report issued by the UK Government in May 2016 on the progress of the UK Anti-Corruption Plan suggests that the UK will implement a central register of UK company beneficial ownership information after the necessary primary and secondary legislation are in place. This is subject to Parliamentary timetable which might pass by the end of 2016.<sup>398</sup>

The UK Anti-Corruption Action plan is a clear success story of the reflexive governance of the EU Anti-Corruption Report. The report issued by the UK Government in May 2016 on the progress of the UK Anti-Corruption Plan responds positively to Transparency International recommendations and strengthens communication and involvement of society in policy-making.<sup>399</sup> The UK Anti-Corruption Plan takes into account the sound research produced by Transparency International UK in the Defence Companies Anti-Corruption Index 2015, in which TI-UK provided an analysis of what the biggest defence companies do and fail to do to prevent corruption.

Overall, the UK has responded positively to the recommendations of the EU Anti-Corruption Report produced by the EU Commission and has exhibited promising efforts in making use of the reflexive governance

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<sup>397</sup> House of Commons (2015), *The Code of Conduct and The Guide to the Rules relating to the Conduct of Members*, Chapter 1 and 2. Retrieved from; <http://www.publications.parliament.uk/pa/cm201516/cmcode/1076/107601.htm>

<sup>398</sup> HM Government (2016), *Progress Update on the UK Anti-Corruption Plan*, pp. 31, Retrieved from; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522802/6.1689\\_Progress\\_Update\\_on\\_the\\_UK\\_Anti-Corruption\\_Plan\\_v11\\_WEB.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522802/6.1689_Progress_Update_on_the_UK_Anti-Corruption_Plan_v11_WEB.PDF)

<sup>399</sup> HM Government (2016), *Progress Update on the UK Anti-Corruption Plan*, pp. 20, Retrieved from; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522802/6.1689\\_Progress\\_Update\\_on\\_the\\_UK\\_Anti-Corruption\\_Plan\\_v11\\_WEB.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522802/6.1689_Progress_Update_on_the_UK_Anti-Corruption_Plan_v11_WEB.PDF)

theory. This is in striking contrast to the widespread negative attitude in the UK towards EU policies.

## 4.3 Romania

### 4.3.1 The EU Anti-Corruption Report for Romania

The EU Anti-Corruption Report country chapter for Romania finds that petty and political corruption remain a systemic problem. Whilst some anti-corruption reforms have been pursued over the years, their result proved to be ineffective and easily reversible. The EU Anti-Corruption Report finds that when it comes to prosecution of high-level corruption cases in Romania, the political will to address corruption and promote high standards of integrity has been inconsistent.<sup>400</sup> Nevertheless, the EU Anti-Corruption Report for Romania finds some positive steps in the efforts to fight the systemic problem of corruption. The EU Commission suggested that Romania should build on the progress that it has made so far under the CVM in addressing corruption.

The EU Anti-Corruption Report for Romania has identified four key areas which it suggested for further improvement. The four outstanding areas that the Report calls for further attention are mainly about the dysfunctional impact that corruption has in the judiciary, politics, the healthcare system and public procurement - that is an area of particular interest for the EU Commission in all of the EU Member States.<sup>401</sup> The EU Commission, under the EU Anti-Corruption Report, mainly suggested that further policy action must be taken by Romania to increase the efficiency of preventing corruption in the four identified areas.

According to Marian Enache's account, the judicial system in Romania is vulnerable to falling victim to corrupt practices.<sup>402</sup> Despite the structural development that the judiciary went through as part of the EU integration process, Romania to this date still cannot not meet the standards of

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<sup>400</sup> Belasen, T and R. Toma (2016), *Confronting Corruption in Business: Trusted Leadership, Civic Engagement*. London and New York: Routledge, pp. 127-166.

<sup>401</sup> Piga, G and T. Tatrai (2016), *Public Procurement Policy*. London and New York: Routledge, pp. 1-9.

<sup>402</sup> Enache, M (2012), 'The evolution of the justice reform in Romania', *US-China Law Review*, 9(3), pp. 175-183.

efficiency, independence and impartiality required to be a Member of the European Union. The justice system, together with the political system in Romania according to Martin Mendelski,<sup>403</sup> remains as one of the most visible sectors which are prone to corrupt practices. Further reforms and restructuring of the judiciary to prevent corruption and persecute high corruption cases are stipulated in the EU Anti-Corruption Report country chapter for Romania, as well as the January 2016 CVM report. The need to develop and implement a set of adequate corruption-combating policies and strategies in the justice system has become increasingly imperative and reforming the justice system has been a large part of the EU and Romanian relationship in preparing the country for EU membership.<sup>404</sup> In Sebastian Văduva's account, despite the many studies and strategies supported by the EU Commission in Romania, according to the public and non-governmental organisations, the judiciary is still far from ensuring integrity and independence of the judiciary.<sup>405</sup>

As a result, the EU Anti-Corruption Report country chapter for Romania suggested that the country must ensure that all necessary guarantees remain in place to protect the stability, independence and maintenance of the track record of anti-corruption institutions and the judiciary concerning non-partisan investigations and effective court proceedings regarding high-level corruption cases,<sup>406</sup> in particular to those elected and appointed officials. Furthermore, the report suggested implementing preventive measurements accompanied by an effective sanctioning regime to strengthen the integrity standards in the judiciary. Thus, it would require including all the relevant stakeholders in the judicial system, such as the Superior Council of Magistracy, the Judicial Inspection, magistrates' associations, courts and prosecutors' offices according to the EU Anti-Corruption Report country

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<sup>403</sup> Mendelski, M (2012), 'EU-driven judicial reforms in Romania: a success story?', *East European Politics*, **28**(1), pp. 23–42.

<sup>404</sup> Anitta M. H. (2015), *Beyond the Rhetorics of Compliance: Judicial Reform in Romania*. London: Springer, pp. 17-33.

<sup>405</sup> Văduva, S (2016), *From Corruption to Modernity: The Evolution of Romania's Entrepreneurship*. London: Springer, pp. 4-24.

<sup>406</sup> Carp, R (2014), 'The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism'. *Utrecht Law Review*, **10**(1), pp. 1-16.



chapter for Romania.<sup>407</sup>

In Michael Hein's account, Romania has been going through two essential phases in reforming the judicial system. Firstly, the enactment of the new Constitution of Romania in 1991; secondly, the accession of Romania to the European Union.<sup>408</sup> The EU has played a role as an external driver for judicial reforms in Romania, especially since the introduction of the CVM in December 2006. The judicial reform actions were subjected to benchmark-based monitoring since the CVM was introduced and focused on several projects of judicial strengthening. These included the judicial capacity-building of specific judicial bodies, the unification of the jurisprudence of courts and prosecutor offices, strengthening of the public ministry's institutional capacity, improvement of the system of Romanian judicial statistics, strengthening of the probation system and improvement of the management and media training for magistrates.<sup>409</sup> However, in terms of judicial improvement, the Commission has mixed views in its evaluation of the post-accession phase. The CVM and the EU Anti-Corruption Report, as well as researchers on the field of anti-corruption, also note such an observation.<sup>410</sup> Meanwhile, strengthening the judiciary continues to be a point that the EU asks for more support in regards to human resource and integrity shortcomings in the Romanian judicial system. The third section of this chapter will analyse in more depth the issue of corruption in the judicial system in Romania and draws analysis on the historical factors in more depth.

In Iuliana Precupetu's account, the political system has similar corruption problems to the judicial system and has dominated Romanian political discourse for many years and become a structural feature of post-socialist

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<sup>407</sup> Hammergren, A. L (2014), *Justice Reform and Development: Rethinking Donor Assistance to Developing*. London and New York: Routledge, pp. 118-128.

<sup>408</sup> Hein, M (2015), 'The Fight Against Government Corruption in Romania: Irreversible Results or Sisyphean Challenge?', *Europe-Asia Studies*, 67(5), pp. 747-776,

<sup>409</sup> Hammergren, A.L (2014), *Justice Reform and Development: Rethinking Donor Assistance to Developing*. London and New York: Routledge. pp. 118-128.

<sup>410</sup> Mendelski, M (2012), 'EU-driven judicial reforms in Romania: a success story?', *East European Politics*, 28(1), pp. 23-42.

transformation in Romania.<sup>411</sup> The large majority of the political elite has continuously opposed the prosecution and conviction of corrupt offenders in Romania. After a long constitutional conflict that seriously inhibited the fight against political corruption between 2006 and 2009, law enforcement agencies started to experience some success in prosecuting high government officials that misused their public power for personal gain. Nevertheless, the extent of political corruption remains consistently high and punishing public office holders against corruption remains relatively low in Romania.<sup>412</sup>

Thus, the EU Anti-Corruption Report country chapter for Romania suggested that Romania should implement a comprehensive code of conduct for elected officials and ensure consistent accountability tools and sanctions for corrupt practices, conflicts of interest and incompatibilities.<sup>413</sup> Furthermore, the EU Anti-Corruption Report suggested that Romania should consider developing an ethical code for political parties and take into consideration establishing an ethical pact between political parties to encourage more high standards of integrity. The EU Anti-Corruption Report country chapter for Romania also suggested that Romania should ensure that all the decisions concerning lifting of immunities are rational and taken promptly.<sup>414</sup> On a final point, the Report suggested that the political elite should (not?) try to obstruct justice and fully cooperate with law enforcement.

In Alina Mungiu-Pippidi's account, she identifies three sets of factors in regards to the high-level corruption in the political system.<sup>415</sup> Firstly,

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<sup>411</sup> Tänzler, D., Giannakopoulos, A., Maras, K (2012), *The Social Construction of Corruption in Europe*. Surrey: Ashgate, pp. 6-8.

<sup>412</sup> Dimitrova, A (2015), 'The Effectiveness and Limitations of Political Integration in Central and Eastern European Member States: Lessons from Bulgaria and Romania', "Maximizing the integration capacity of the European Union: Lessons of and prospects for enlargement and beyond" (MAXCAP *Working Paper Series. No. 10* | June 2015

<sup>413</sup> Sedelmeier, U (2014), 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession', *Journal of Common Market Studies*, 52(1), pp. 105–121,

<sup>414</sup> Sedelmeier, U (2014) 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession'. *Journal of Common Market Studies*, Vol 52, Issue 1, pp. 105–121

<sup>415</sup> Mungiu-Pippidi, A (2008), 'How Media and Politics Shape Each Other in

political culture is regarded as one of the main factors that causes corruption in Romania to the extent in which it predetermines the ways in which political elites socialise.<sup>416</sup> Secondly, researchers find the influence of communist legacies as an explanation for the degree of corruption, because of the governance nature that had been more autocratic, undemocratic, unaccountable and not transparent.<sup>417</sup> Thirdly, poor economic development in Romania is also observed as a central explanatory factor for corruption. Thus, the poor wages for civil servants, difficulties in political party funding and the lack of sufficient resources for anti-corruption policies lead to a higher degree of political corruption in Romania.<sup>418</sup> These three factors still contribute to the high level of corruption in the political system in Romania and the EU Anti-Corruption Report country chapter for Romania acknowledges that the political culture that is characterised by an antagonistic relationship between state and society, in which the political elites are viewed to misuse their public office. As a result, the EU Commission suggested further action to tackle corruption in the political system. In the next section of this chapter, the corruption in the political system will analyse the challenges that have occurred in the fight against corruption in the Romanian political system since the introduction of the CVM in 2006.<sup>419</sup>

As demonstrated in Chapter 2, public procurement has been given prominence by the EU Commission in the EU Anti-corruption Report in assessing costs of corruption for the EU economy.<sup>420</sup> The costs of corruption in public procurement vary considerably between each Member

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the New Europe', *Romanian Journal of Political Science Romanian Academic Society*, 8(1), pp. 69–78.

<sup>416</sup> Grødeland, A (2014), 'Public and Elite Perceptions of Supranational Courts: The European Perspective', *Review of Central and East European Law*, 39(1), pp. 41–94.

<sup>417</sup> Connolly, R (2013), *The Economic Sources of Social Order Development in Post-socialist Eastern*. London and New York: Routledge, pp. 141–175.

<sup>418</sup> Kostadinova, T (2012), *Political Corruption in Eastern Europe: Politics After Communism*. Boulder: Lynne Rienner. pp. 33–34.

<sup>419</sup> Baun, M and D. Mare (2013), *The New Member States and the European Union: Foreign Policy and Europeanization*. London and New York: Routledge, pp. 175–189.

<sup>420</sup> Calleja, A (2016), *Unleashing Social Justice Through EU Public Procurement*. London and New York: Routledge, pp. 107–125

States and public procurement in Romania accounted for 11% of GDP.<sup>421</sup> The EU Anti-corruption Report, together with the Europe 2020 strategy, considers tackling corruption in public procurement as an important factor to improve the business environment and to enhance the performance of businesses in the EU.<sup>422</sup> In line with this focus on public procurement, the EU Anti-Corruption Report country chapter for Romania suggests public procurement as a main area of concern.

The EU Anti-Corruption Report suggests that Romania should consider developing uniform and effective prevention tools within contracting authorities and public procurement supervisory bodies, with a particular focus on conflicts of interest. Furthermore, the EU Anti-Corruption Report suggested that Romania should ensure that there is a systematic monitoring and transparency of the implementation of large-scale public contracts, especially those projects that are EU-funded. The EU Anti-Corruption Report suggests for Romania that there should be a constancy of the legal framework on conflicts of interests and the incompatibility rules related to elected representative officials. The EU Anti-Corruption Report also suggested that Romania develop a more efficient system to detect and sanction conflicts of interest in public procurement. Furthermore, the EU Anti-Corruption Report also suggests that Romania should establish an effective control mechanism targeting the allocation of government funds to local administrations and state-owned companies, by implementing safeguards against discretionary allocation to the detriment of the public interest - i.e. strengthening anti-corruption tools for public procurement processes within state-owned companies.

The EU Anti-Corruption Report country chapter for Romania and research finds that public procurement is a sector that is vulnerable to corruption in Romania and EU funds can be an area vulnerable to corruption. Mihály

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<sup>421</sup> Piga. G and T. Tatrai (2016), *Public Procurement Policy*. London and New York: Routledge, pp. 1-9.

<sup>422</sup> Piga. G and T. Tatrai (2016), *Public Procurement Policy*. London and New York: Routledge, pp. 1-9.

Fazekas argues that external funds, such as EU funds, may deteriorate the quality of government and as a result increase the risk of corruption in member states, such as the example of Romania.<sup>423</sup> Fazekas suggest that there are three reasons for this. Firstly, EU funds are often spent on public projects, such as road construction, where public discretion is fairly high and spending is more likely linked to corruption than non-discretionary spending. Secondly, EU funds offer a large pool of public resources for rent extraction of public agencies. Thirdly, EU funds weaken the link between domestic civil society, taxation and policy performance. Some of these reasons have been witnessed in Romania and, in the next section of this chapter, there will be an evaluation and analysis of the issues that concern public procurement in more depth.<sup>424</sup>

Healthcare system is characterised as a sensitive issue in Romania because of bad management and underfunding. Since the collapse of communism, there has been increasing use of informal payments and corruption to get access to healthcare treatment in Romania.<sup>425</sup> Healthcare is one of the sectors where informal payments are often used in Romania and it has been noticed by the EU Commission and the literature to be problematic, because of the social impact in Romanian society. Patients give doctors, nurses and hospital staff money or gifts for services in exchange for health services.<sup>426</sup> As a result, the EU Anti-Corruption Report country chapter for Romania acknowledges that the country has severe problems cornering with informal payments in the public healthcare system and suggests Romania to take further action to tackle the informal payments in the public healthcare system.

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<sup>423</sup> Fazekas, M., Tóth, I. J., and P.L. King, L. P. (2014), *Are EU funds a corruption risk? The impact of EU funds on grand corruption in Central and Eastern Europe*. Budapest: Corruption Research Centre, pp. 1-23.

<sup>424</sup> Fazekas, M., Tóth, I. J., and P.L. King, L. P. (2014), *Are EU funds a corruption risk? The impact of EU funds on grand corruption in Central and Eastern Europe*. Budapest: Corruption Research Centre, pp. 1-23.

<sup>425</sup> Moldovan, A. and S. Van de Walle (2013), 'Gifts or bribes? Attitudes on informal payments in Romanian Health Care'. *Public Integrity*, **15**(4), pp. 383-399.

<sup>426</sup> Moldovan, A. and S. Van de Walle (2013), 'Gifts or bribes? Attitudes on informal payments in Romanian Health Care'. *Public Integrity*, **15**(4), pp. 383-399.

The EU Anti-Corruption Report suggests that Romania must consider implementation of more effective strategies to reduce the level of informal payments in the public healthcare system, by considering to improve the working conditions for medical staff and their wages.<sup>427</sup> Furthermore the EU, in its Anti-Corruption Report, suggests that Romania ensure operational independence of the integrity department within the Ministry of Health and allow the integrity department to supervise the budgetary and procurement aspects. Furthermore, the EU Anti-Corruption Report suggested that the Romanian Ministry of Health should take into consideration the internal follow-up of the department's findings.<sup>428</sup> In other words, it should engage in regulation of self-regulation more effectively. This is a clear example where the EU Anti-Corruption Report supports Romania to engage in a reflexive governance exercise.

The Romanian health system suffers from a range of difficulties including extensive management deficiencies, inadequate or lack of medical equipment, as well as limited or no access to medical care in rural areas. Empirical evidence suggests that the use of informal payments is widespread in the country and interactions between health professionals are filled with informal payments, which constitute corruption by patients.<sup>429</sup> Employees in medical centres and hospitals in Romania also act as gatekeepers to health facilities, treatments, and non-medical care such as food or clean sheets. In Romania, offering gifts and even paying bribes is, therefore, quite common practice in the healthcare systems. Thus, the distinction between both is often quite narrow.<sup>430</sup> However, the same

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<sup>427</sup> Stepurko, T., Pavlova, M., Gryga, I. and W. Groot (2013), 'Informal payments for health care services-corruption or gratitude? A study on public attitudes, perceptions and opinions in six Central and Eastern European countries', *Communist Post-Communist Stud.*, **46**(4), pp. 419–31.

<sup>428</sup> European Commission (2014), *Annex 23: Romania to the EU Anti-Corruption Report*, COM (2014) 38 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014\\_acr\\_romania\\_chapter\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_romania_chapter_en.pdf)

<sup>429</sup> Stepurko, T., Pavlova, M., Gryga, I., and W. Groot (2013), 'Informal payments for health care services – corruption or gratitude? A study on public attitudes, perceptions and opinions in six Central and Eastern European countries.' *Communist and Post-Communist Studies*, **46**(4), pp. 419–431.

<sup>430</sup> Cohen, N (2012), 'Informal payments for health care – the phenomenon and its context', *Health Economics, Policy and Law*, **7**(3), pp. 285–308.

behaviours that are observed as corruption by some researchers may be interpreted as mere acts of gratitude by others. The healthcare sector-related research often uses the concept of ‘informal payments’ to label the exchange of money, gifts or services between patients or their families and healthcare personnel.<sup>431</sup> The next session investigates the exchange of informal payments in Romania and the factors behind such common practices of informal payments in the public healthcare system, as well as the interest by the EU Anti-Corruption Report to address informal payments.

To sum up, the EU Anti-Corruption Report future steps recommendations for Romania are mainly focused on four key areas that need further attention. The EU Anti-Corruption Report views the investigations and effective court proceedings of high-level corruption cases and strengthening the integrity standards in the judiciary to be of great importance. Furthermore, the Report finds that Romania should implement a comprehensive code of conduct for the elected officials, developing an ethical code for political parties and ensure that lifting of immunities are taken promptly that there is no obstruction to justice. The Report also finds to a great extent that Romania should establish an effective control mechanism and procurement supervisory bodies concerning the allocation of government funds to local administrations and state-owned companies to be made public. Finally, the EU Anti-Corruption Report suggests that Romania should address corruption in the healthcare system and implement effective strategies to reduce the level of informal payments.

The following section will analyse the recommendations for Romania made in the EU Anti-Corruption Report in the light of the long-term efforts and interactions of the EU Commission and the various Romanian governments that have focussed on fighting corruption. It will become apparent that the four key areas addressed in the EU Anti-Corruption Report are linked to

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<sup>431</sup> Stepurko, T., Pavlova, M., Gryga, I., and W. Groot, (2013), ‘Informal payments for health care services – corruption or gratitude? A study on public attitudes, perceptions and opinions in six Central and Eastern European countries.’ *Communist and Post-Communist Studies*, **46**(4), pp. 419–431.

ongoing discussions as part of special monitoring of Romanian policy developments. Of particular relevance in this context is the Cooperation and Verification Mechanism (CVM).

#### **4.3.2 The EU anti-corruption strategy towards Romania**

During the pre-accession stage, Romania was regularly ranked as one of the most corrupt countries in Central and Eastern Europe and one of the most corrupt EU candidate countries at the time according to Transparency International. As a result, Romania was considered to be a challenging case for accession to the EU and regularly lagged behind all other EU candidate states. Even though Romania was considered to have a serious problem with corruption, it did receive full EU membership in January 2007.

The accession of Romania and Bulgaria in 2007 completed the enlargement in the CEE that began in 2004, but it also marked the start of a policy change in evaluating anti-corruption reform post-accession as both countries possess significantly high levels of corruption. As was illustrated in Chapter one, the EU did not apply any instrument to monitor progress in fighting corruption within the CEE countries after their accession in May 2004.<sup>432</sup>

Since 2005, when the Treaty of Accession with Romania and Bulgaria was signed, one could observe a change in the Commission's strategy in pushing for rigorous anti-corruption policies and preventive measurements before a country joined the EU.<sup>433</sup> Corruption at this stage emerged as one of the most serious issues and was regarded as an obstacle for accession into the EU. The Commission at this stage also started to monitor Romania more thoroughly than the other CEE states that joined the EU in 2004. One can distinguish two reasons for a different approach that the EU

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<sup>432</sup> Noutcheva, G (2006), Bulgaria and Romania's Accession to the EU: Postponement, Safeguards and the Rule of Law. *CEPS Policy Briefs No. 102, 15 May 2006*. [Policy Paper] [http://shop.ceps.eu/downloadfree.php?item\\_id=1329](http://shop.ceps.eu/downloadfree.php?item_id=1329), accessed 26 February 2016

<sup>433</sup> Venelin, I.G. (2013), 'Post-Accession Hooliganism: Democratic Governance in Bulgaria and Romania after 2007'. *East European Politics and Societies*, 27(1 pp. 26-44.



Commission took for Romania. One, it is easier to monitor only two countries in contrast to eight countries. Secondly, the issue of corruption was much more serious in the case of Romania.<sup>434</sup>

Another factor that contributed to a trickier approach by the Commission in regards to Romania was the change of political climate within the EU. The rejection of the Constitutional Treaty in the Dutch and French referendums indicated a public disapproval of various aspects of EU policy, including that of the enlargement policy.<sup>435</sup> In a more difficult political environment, the EU Commission was under pressure to require for more tangible evidence that there was a strong commitment from Romania to fight corruption. In addition, the EU Commission had more experience from the previous enlargement in putting more pressure to tackle corruption in new Member States and it recognised at an earlier stage their anti-corruption policy shortcomings. The EU Commission also had more experience in monitoring new Member States to guarantee that the appropriate implementation of anti-corruption measurements was effective and new Member States were able to adopt good governance tools. Thus, the strategy towards Romania was reinforced in two ways. Firstly, the EU Commission introduced a tool for possible postponement for the accession of Romania. Secondly, the EU Commission introduced a Verification and Cooperation Mechanism to monitor progress in the area of anti-corruption reform after the accession process was finished by Romania.<sup>436</sup>

The postponement clause, as Lazowski argued, served as a tool to discipline Romania in their very last phase of the pre-accession.<sup>437</sup> The postponement clause was also part of the special list for anti-corruption commitments to be followed, even after the accession negotiations were closed for

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<sup>434</sup> Gateva, E (2013), 'Post-accession conditionality – translating benchmarks into political pressure?', *East European Politics*, **29**( 4 pp. 420-442.

<sup>435</sup> Noutcheva, G and B. Dimitar (2008), 'The Successful Laggards: Bulgaria and Romania's Accession to the EU', *East European Politics and Societies*, **22**(1 pp. 114-144.

<sup>436</sup> Dimitrova, A and A. Buzogany (2014), 'Post-accession Policy-Making in Bulgaria and Romania: Can Non-state Actors Use EU Rules to Promote Better Governance?', *Journal of Common Market Studies*, **52**(1), pp. 139-156.

<sup>437</sup> Lazowski, A (2007), 'And Then They Were Twenty-Seven ... A Legal Appraisal of the Sixth Accession Treaty', *Common Market Law Review*, **44**(2), pp. 401-430.

Romania.<sup>438</sup> The EU Commission presented only Poland with one special recommendation in the previous round of enlargement in introducing liability of legal persons for corruption.<sup>439</sup> By contrast, the list presented to Romania clearly suggested that the EU Commission took a much tougher stand in developing policy to fight corruption in the round of the enlargement in 2007. Thus, the EU policy against corruption was emerging at this time as the first sign of a separate EU anti-corruption policy field.

Despite continuous problems with corruption and the lack of progress observed in the EU Commission's reports about Romanian's effort to tackle corruption, to delay the accession of Romania until 2008 would have carried significant political risks. Thus, the EU acknowledged all these risks and decided not to delay the accession of Romania, even though corruption was high and Romania did not fulfil the EU membership criteria as Noutcheva noted.<sup>440</sup> The EU Commission found itself in a position where, on the one hand, it could not delay the accession of Romania without losing its political credibility. On the other hand, the accession of Romania with high levels of corruption and inadequate structures against organised crime could undermine the functioning of the EU.

The EU Commission found itself under pressure and ultimately opted for a third scenario. It decided to establish a regime of post-accession monitoring mechanisms called the Cooperation and Verification Mechanism, which no new Member State had faced after joining the EU. As illustrated in Chapter 1, this new development also marked the very first post-accession conditionality that new Member States were obliged to respond. Thus, Romania was accepted to join the EU under the condition that they would meet certain key anti-corruption standards and benchmarks after accession

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<sup>438</sup> Levitz, P and G. Pop-Eleches (2010), 'Monitoring, Money and Migrants: Countering Post-Accession Backsliding in Bulgaria and Romania'. *Europe-Asia Studies*, **62**(3), pp. 461-479.

<sup>439</sup> Szarek-Mason, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. pp. 225

<sup>440</sup> Noutcheva, G (2006) *Bulgaria and Romania's Accession to the EU: Postponement, Safeguards and the Rule of Law*. CEPS Policy Briefs No. 102, 15 May 2006. [Policy Paper] [http://shop.ceps.eu/downfree.php?item\\_id=1329](http://shop.ceps.eu/downfree.php?item_id=1329), accessed 26 February 2016

to the EU.<sup>441</sup> Below is an analysis and illustration of the Cooperation and Verification Mechanism, which marked a key aspect of the EU support to develop a coherent anti-corruption policy field in Romania.

#### **4.3.3 The Mechanism for Cooperation and Verification (CVM) for Romania**

The CVM is an anti-corruption mechanism, which was designed to keep the reform momentum in Romania and avoid reversal of the rule of law reforms, and implement key anti-corruption measurements. The monitoring mechanism allows the EU to retain some leverage in the area of anti-corruption policies after Romania accessed to the EU. It has been noted that the EU acted on a hypothesis that, on balance, it may be preferable to work with them when they are inside rather than to try to push for anti-corruption reforms from the outside.<sup>442</sup> Every six months, the Commission issues a report on Romania that evaluates the progress on the bases of the established benchmarks and stresses the important issues that are necessary to be addressed before the next report.<sup>443</sup> These monitoring reports have been acknowledged for being very detailed and for following the progress of administrative reforms, judicial improvements and political developments. These monitoring reports have played a vital role in gathering information about the government reforms in Romania.<sup>444</sup>

The main report is published in the summer of each year and contains a detailed evaluation of progress and recommendations for further anti-corruption reforms in Romania. Each winter, the EU Commission publishes an interim report providing a technical update on important developments

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<sup>441</sup> Riste, M.G (2012), 'EU Enlargement and Anticorruption: Lessons Learned from Romania.' *Journal of European Integration*, **34**(5) pp 429-446.

<sup>442</sup> Szarek-Mason, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. pp. 225

<sup>443</sup> Rogowski, R. (2010), ALACs and the concept of citizen participation in the light of European Law. Discussion Paper Series 1, Konstanz. Retrieved from; <http://www.soziologie.uni-konstanz.de/alacs/project/papers1/>

<sup>444</sup> Philip, L and G. Eleches (2010), 'Monitoring, Money and Migrants: Countering Post-Accession Backsliding in Bulgaria and Romania', *Europe-Asia Studies*, **62**(3), pp. 461-79.

that occurred in the last six months. However, the interim report does not include an evaluation of progress accomplished. The progress report that is issued in the summer remains the main point of reference for the assessment of progress in Bulgaria and Romania.<sup>445</sup> The CVM was supposed to come to an end after five years in 2012. However, the Commission decided to leave the CVM in place, even with the introduction of the EU Anti-Corruption Report, in order to keep the pressure on Romania to enhance the rule of law and establish a comprehensive anti-corruption policy field.

The CVM for Romania contains some objectives known as benchmarks in which Romania is evaluated on. The EU Commission reports to Romania are issued on the degree in which these benchmarks have been achieved. If they are not achieved, the EU Commission offers technical assistance to Romania to fulfil these objectives. The Commission established the following four benchmarks, which mainly focus on the function of the rule of law in which Romania is evaluated that:<sup>446</sup>

- (1) Ensure a more transparent and efficient judicial process, notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedural codes.
- (2) Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
- (3) Building on progress already made; continue to conduct professional, non-partisan investigations into allegations of high-level corruption.
- (4) Take further measures to prevent and fight against corruption, in

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<sup>445</sup> European Commission (2006), Commission Decision of 13/XII/2006', C (2006) 6570 final.

<sup>446</sup> European Commission (2006), Commission Decision of 13 December 2006, C(2006) 6569.

particular within local government.

All the same, these so-called four ‘benchmarks’, as listed above for Romania, established by the EU Commission for Romania are not in essence benchmarks. Typically, a benchmark is a standard of best practice against something that can be measured.<sup>447</sup> The EU Commission’s benchmarks under the CVM resemble more targets that Romania should meet rather than a standard against in which objectives could be measured. Furthermore, the CVM does not give any tools for assessing or measuring progress which are normally an important part of any benchmarking instrument.<sup>448</sup>

What in fact the CVM provides is a set of targets, most of which are expressed in a rather abstract manner. For instance, ‘continue the reform of the judiciary’ or ‘take further measures to prevent and fight corruption’. Patrycja Mason’s analysis shows that drawing up such general targets clearly indicates that the CVM is more of a political instrument rather than a technical mechanism.<sup>449</sup> This analysis shows whether or not Romania has adequately addressed the benchmarks. The wide definition of the benchmarks leaves the door open for the EU Commission to put certain targets throughout its regular reports under the CVM. Even continuing beyond the seven years it was initially designed to serve as an instrument.

An expert reviewer of the Commission, Belgian prosecutor Willem de Pauw, stated in a CVM report mentioned by *The Economist*, that ‘the Romanian judiciary system appears to be unable to function properly when it comes to applying the rule of law against high-level corruption’ and the

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<sup>447</sup> Szarek-Mason, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 225.

<sup>448</sup> Szarek-Mason, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 225.

<sup>449</sup> Szarek-Mason, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 225.

situation would soon revert to the pre-accession level of 2003.<sup>450</sup> De Pauw's report also suggested that the apparent paradox that the judges cannot be accused for this situation, as it would be illogical to impute to the judiciary a lack of 'corruption awareness'. The fight against corruption is generally defined as a policy imperative with which judicial function has nothing to do. Judges apply the law independently and impartially to individual cases.<sup>451</sup>

The benchmarks set out for Romania refer to certain shortcomings in the areas of judicial reform and the fight against corruption; failure to sufficiently address these issues would have resulted in the activation of the justice and home affairs (JHA) safeguard clause.<sup>452</sup> However, the EU Commission did not activate any clause and the Commission's decision not to trigger any of the safeguard measures is related to the scope of the explicit threats and more accurately to the penalising power of the remedial and preventive sanctions established by the safeguard clauses. The remedial and preventive sanctions are considered to be limited and inadequate - some Member States have even pushed for its activation. The Dutch Minister of EU affairs *Timmermans* sent a letter to the former Justice Commissioner *Barrot*, asking the Commission to consider activating the JHA safeguard clause if the reports fail to register sufficient progress.<sup>453</sup> This was even though the applicability of their sanctions expired at the end of 2009.

In Romania, the political will to tackle domestic institutional reform has been uneven since before it joined the EU and the EU Anti-Corruption Report 2014 also suggests that it is uneven. There was a surge in activity in the run-up to accession, but much of the political elite responded by closing ranks and working to dilute or remove the curbs on corruption that were

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<sup>450</sup> The Economist, (2008), In Denial - The European Union Conceals Romania's Backsliding on Corruption. *The Economist*, (3 July 2008) [Online] Retrieved from: <http://www.economist.com/node/11670671>

<sup>451</sup> Bogdan, I (2011), 'Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania', *European Constitutional Law Review*, 6(1), pp. 28-58

<sup>452</sup> European Commission (2006), Commission Decision of 13/XII/2006', C (2006) 6570 final.

<sup>453</sup> Gateva, E (2015), *European Union Enlargement Conditionality*. New York: Palgrave Macmillan, p. 102.

implemented at that time. Unlike in CEE states, where new parties exploited the failure of the government to fight corruption, in Romania some of the old parties worked to push the issue under the rug. Nevertheless, when the EU has put strong pressure on Romania, the government has responded under the CVM, mainly by passing legislation in the parliament.<sup>454</sup> Mihaela Ristei supports such an analysis, as in Romania there has been progress in the fight against corruption when EU leverage and electoral pressures have created political incentives for some domestic elites to spearhead reforms, but not mostly because of the CVM.<sup>455</sup> This is a clear example that there is not much of the theory of reflexive governance approach. The former Romanian justice minister, Monica Macovei, recommended that the reforms of the judiciary and the fight against corruption should continue after accession to the EU and that the post-accession monitoring process was needed to keep the pressure.<sup>456</sup>

The CVM overall has helped the Commission to monitor the progress of important cases and put pressure on the judiciary and the parliament to act appropriately. However, the progress in respect to fighting corruption still remains very slow. Many corruption cases never go to trial. The Commission has called for urgent action to fast-track trials that risk being finished, because it's been a long time since the alleged crime.<sup>457</sup> The work of government representatives in various areas still remains poor, since accountability is mostly absent and political allegiance is the leading determinant of success.<sup>458</sup> The CVM, however, has shown important factors that helped to draw a general picture of the issue of corruption in Romania, and was the basic model for establishing the EU anti-Corruption Report.

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<sup>454</sup> Ristei, M. (2010), 'The Politics of Corruption: Political Will and the Rule of Law in Post Communist Romania', *Journal of Communist Studies and Transition Politics*, **26**(3), pp. 341-362.

<sup>455</sup> Ristei, M. (2010), 'The Politics of Corruption: Political Will and the Rule of Law in Post Communist Romania', *Journal of Communist Studies and Transition Politics*, **26**(3), pp. 341-362.

<sup>456</sup> Gateva, E (2015), *European Union Enlargement Conditionality*. New York: Palgrave Macmillan, p. 102.

<sup>457</sup> European Commission (2012), *Interim Report from the Commission to the European Parliament and the Council on Progress in Romania/Bulgaria under the Cooperation and Verification Mechanism*, COM (2012) 56/57 final.

<sup>458</sup> Romanian Academic Society (2011), *Beyond perception: Has Romania's governance improved after 2004?*, Retrieved from; <http://www.sar.org.ro/polsci/?p=573>

However, the CVM, as an incitement to cover the years, has only offered temporary results by push Romanian and does not solve the problem in the long term. The fact that the CVM was extended beyond the five-year objective that was initially designated and also since it is being used still as a tool by the Commission; even with the EU Anti-Corruption Report in place, it shows that it is not as effective in the long future. The decision on the CVM foresees that the mechanism can be applied until all the benchmarks set under the mechanism are satisfactorily fulfilled. However, even after ten years of accession of Romania to the EU, the benchmarks are still not fully met. It is not realistic to expect that the problems of corruption will be cured anytime soon in Romania; the fact that it is distinguished as systematic possesses many policy challenges for success. Even if the sanctions were applied to Romania, they would affect innocent citizens and companies, as the court judgments affecting their legal position will not be recognised elsewhere in Europe.

In summing up the EU anti-corruption policy towards Romania, it can be argued that much of the relationship between Romania and the EU has been based on establishing key anti-corruption measures to fight corruption more effectively in many sectors. Thus, much of the relationship is characterised on Romanian implementing key measures and reforms that the EU requested in the CVM and the pressures that the EU Commission puts on the Romania Government to implement those reforms. The EU Commission also supports in many cases Romania in developing an anti-corruption policy field, but the support is not based on the theory of reflexive governance up to this point. This is because the theory of reflexive governance requires the EU Commission and Romania to engage in a dialogue for establishing an anti-corruption policy. Furthermore, the theory of reflexive governance requires more engagement of civil society and a multi-level approach to establish an anti-corruption policy field. So far, much of the discussion has been dominated by the EU Commission requiring and pushing Romania to implement key reforms, which ultimately would contribute to establish an anti-corruption policy field. The next part evaluates the recommendation that the EU Anti-Corruption Report made



for Romania, and what progress Romania has made since the Report was issued. Furthermore, the next part will analyse if the EU Anti-Corruption Reports' recommendations made for Romania embody elements of the theory of reflexive governance.

#### **4.3.4 The EU Anti-Corruption Report for Romania**

The EU Anti-Corruption Report recommendations for Romania are mainly focused on four key areas as stipulated in the introduction. Those include addressing corruption in sectors such as the judiciary, politics, public procurement contracts, and the healthcare system.

##### **4.3.4.1 The Judicial System**

The EU Anti-Corruption Report suggested that Romania must still work on safeguarding the stability and independence of the judiciary. Furthermore, the EU Anti-Corruption Report emphasised that Romania should continue to keep the track record of anti-corruption institutions and ensure that there are non-partisan investigations regarding high-level corruption cases. The Report also highlighted that there should be evidence and track records in tackling corruption and prosecutions of elected and appointed officials in particular. Furthermore, the EU Anti-Corruption Report recommended that Romania implements coherent preventive measurements, supplemented by an effective sanctioning regime in order to strengthen integrity in the judiciary. This is specifically aimed at all the relevant stakeholders in the judiciary, such as the Superior Council of Magistracy, the Judicial Inspection, magistrates' associations, courts and prosecutors' offices.

Corruption is viewed as a serious threat to judicial performance in CEE states overall and, in particular, challenge the post-communist transition. Many countries found judicial corruption to be an obstacle for European membership and had to go through immense restructuring to adopt preventive tools to combat corruption in the justice system.<sup>459</sup> This included implementing anti-corruption policies and strategies in conjunction with the

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<sup>459</sup> Gallagher, T (2009), *Romania and the European Union: How the weak vanquished the strong*. Manchester: Manchester University Press, pp. 240-242.

EU to address the issue of corruption in the judiciary more coherently. However, not all efforts have been very effective and Romania is an example of a country that, even after joining the EU, still has high levels of corruption in the judiciary. In particular, this applies proportionally to the rule of law.<sup>460</sup> Corruption and applying the rule of law are also a high political debate, and political battle at times between the EU and Romania, as the political elite has put consistent pressure on the justice system and attempts to control the judiciary in Romania. On those bases, the EU made the recommendations in the EU Anti-Corruption Report for the judicial system in Romania. However, it must be noted that the recommendation in the EU Anti-Corruption Report is rather a reiteration of the same issue concerning the judicial system in Romania that has been raised in the CVM since its first publication in 2007.

Defining corruption is a difficult task and research has been unable to find a common working definition as illustrated in Chapter one. Defining judicial corruption can also be more challenging still when it comes to finding a common definition. However, according to Buscaglia, judicial corruption can be more specifically defined: as the use of public authority for the private benefit of court personnel when this use undermines the rules and procedures to be applied in the provision of court services.<sup>461</sup> In analysing the complicated relationship between judicial institutions and corruption, researchers distinguish between different types of judicial corruption, such as administrative corruption, operational corruption,<sup>462</sup> functional and dysfunctional corruption.<sup>463</sup> In the case of Rumania, there is an issue with administrative and operational judicial corruption, which the EU Anti-Corruption Report also observed to be highly problematic.

In Romania and in most of the CEE countries, there is a distinct appeal for

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<sup>460</sup> Carp, R (2014), 'The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism', *Utrecht Law Review*, **10**(1), pp. 1 – 16.

<sup>461</sup> Piana, D (2016), *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice*. London and New York: Routledge, pp. 132 – 134

Piana, D (2016), *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice*. London and New York: Routledge, pp. 132 – 134

<sup>463</sup> Piana, D (2016), *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice*. London and New York: Routledge, pp. 132 – 134

the political networks to increase their pressure and control the judicial system. The external pressure used on judicial personnel, which takes the form of judicial corruption, is applied in order to either lower the legal penalties or change the court decision.<sup>464</sup> Therefore, having control of the judiciary can provide great advantages to political networks, such as political influence on key decisions and protection. In Buscaglia's account, such corrupt acts, which encompass politically motivated court decisions, are returned as favours for career development in the judicial system as a result of their corrupt acts and favouritism to political networks.<sup>465</sup> Such acts are fairly complex and despite the hidden character of operational corruption, academics have identified several indicators such as: conflicting and overlapping authority, political power-struggles over access to resources, manipulating and denying of truthful information, and personal relationships of necessity and loyalty. In other words, there is a weak separation between civil service and party politics, a weak professionalisation of the public institutions, and a lack of administrative accountability and transparency. These acts are also a testament to the deficient political control in most post-communist states.<sup>466</sup>

Further indicators also recognised: the delay of judicial decisions, extended undue procedures, and occasionally judges reject laws on the basis of unconstitutionality. In Heron and Randazo's account regarding judicial corruption, they observed that judges picked indirect strategies as a way to review legislation, rather than declare the whole statute to be unconstitutional. However, judges have on occasion struck down portions of the law as unconstitutional and unlawful.<sup>467</sup> Thus, the judicial dependence on outside pressure is diminished in the Romanian justice

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<sup>464</sup> Szarek-Mason, P (2010), *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries*. Cambridge: Cambridge University Press. p. 232.

<sup>465</sup> Buscaglia, E (2001), 'An analysis of judicial corruption and its causes: An objective governing-based approach', *International Review of Law and Economics*, 21(2), pp. 233–249

<sup>466</sup> Ackerman, R. S. (2006), *International Handbook on the Economics of Corruption*. Cheltenham: Edward Elgar Publishing, pp. 278-282.

<sup>467</sup> Gallagher, T (2009), *Romania and the European Union: How the Weak Vanquished the Strong*. Manchester: Manchester University Press, pp. 115 – 117.

system.

Thus, one could say that the judiciary in Romania is both a perpetrator as well as a victim of corruption. In Romania, political networks may find the financial and power gain from corruption irresistible and; it has been demonstrated that it has been the case over the years with different governments. Once corrupted, the political networks challenge to reduce the effectiveness of the legal and judicial systems through manipulation of resource allocation, and appointments to key positions. For example, just four months after Romania joined the EU, the minister of justice, Macovei, was dismissed from office. This was despite the fact that the EU regarded that Macovei did a good job in pushing for anti-corruption reform in the judiciary.<sup>468</sup> Another example was President Traian Băsescu, who was impeached twice and although he survived both referendums, the impeachment procedures - particularly the latter on 10<sup>th</sup> July 2012 - resulted in high political and economic costs for Romania.<sup>469</sup> Therefore, reducing resources will make it difficult for the legal system to fight corruption and it will give more room for corruption to increase. As a result, a weak judicial system becomes open to corrupt practices and one could interpret that the EU Anti-Corruption Report has reflected on such a rationale. Thus, the EU Anti-Corruption Report suggested for Romania to address more effectively corruption in the justice system.

Nonetheless, it must be noted that, as further explained in Chapter One, reinforcing the performance of the judicial system will depend a lot on the will and application of the rule of law proportionally. Independent and professional behaviour by the judiciary will translate into respect for the rule of law and institutional suitability.<sup>470</sup> This, however, would require political will to build both structural and institutional mechanisms to protect

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<sup>468</sup> Hipper, M. A (2015), *Beyond the Rhetorics of Compliance: Judicial Reform in Romania*. Freiburg: Springer VS, pp. 25-40.

<sup>469</sup> Sadurski, W (2014), *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern European*. Second Edition. Freiburg: Springer. pp. 329-377.

<sup>470</sup> Hipper, M. A (2015), *Beyond the Rhetorics of Compliance: Judicial Reform in Romania*. Freiburg: Springer VS, pp. 25-40.

the independence of the justice system. Without strengthening the institutional side of the judiciary and the independence from political networks, it would be hard to implement the integrity that the EU Anti-Corruption Report calls for the Romanian justice system. The following section will evaluate the issues concerning corruption in the Romanian political system, which one could observe to be linked with the other sectors that politics tries to control. Prado identifies this as an obstacle to strengthening the rule of law itself.<sup>471</sup>

#### **4.3.4.2 The Political System**

The EU Anti-Corruption Report suggested that Romania has to implement a far-reaching code of conduct for the elected officials. Furthermore, Romania needs to establish accountability tools and sanctions for corrupt practices and conflicts of interest. The Report also suggests that Romania should ensure that all the decisions concerning lifting of immunities are correctly reasoned and taken promptly. Thus, there should be no obstruction of justice by the political elite. The EU Anti-Corruption Report also identified that Romania must consider developing an ethical code for political parties and encourage high integrity standards within the political system.

The Romanian political system and elites have been under the EU monitoring scrutiny for corruption for a long period and are under suspicion of not playing by the rules. This explains many of the political scandals related to bribery and corruption. Furthermore, governments are either voted out of office or resign due to corruption related issues. This was shown in November 2015, when the government of Victor Ponta fell and a team of technocrats came in led by Dacian Cioloș, a former European

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<sup>471</sup> Prado, M (2010), 'The paradox of rule of law reforms: How early reforms can create obstacles to future ones', *University of Toronto Law Journal*, **60**(2), pp. 555-578.

commissioner. The Ciolos-led government will be in charge for a maximum of one year before new elections are held in December 2016.<sup>472</sup>

The CVM report that came out on 27<sup>th</sup> January 2016 was positive for the Ciolos-led government, when the European Commission First Vice President Frans Timmermans noticed that ‘Romania and Romanians have shown their willingness to fight corruption and to protect the independence of the judiciary. The mass demonstrations against corruption have shown how these issues matter to Romanian citizens. Over the last year we have seen the professionalism, commitment and good track record of the judiciary and the anti-corruption prosecution and reforms being internalized.’<sup>473</sup>

The resignation of former Prime Minister Ponta in November 2015 and his government had a positive impact in improving the CVM that was issued in early 2016. However, the EU Commission stated that the reform of the judiciary does not enjoy the full consensus necessary to assure sustainable progress and required full participation by the political parties to get consensus.<sup>474</sup> Thus, highlighting that even in 2016, after ten years of the CVM, the judicial independence and respect for court decisions continue to be challenging in Romania. This is an indication that, since the EU Anti-Corruption Report was issued, there has not been substantive reform in ensuring the independency of the judicial system because of a lack of political will.

The first high profile case of fighting corruption in the ranks of politics was when the High Court of Cassation and Justice sentenced the former

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<sup>472</sup> Chiriac, M (2015), Romania Names Ex-Commissioner as New PM. *Balkan Insight*, 11 November 2015, Retrieved from: <http://www.balkaninsight.com/en/article/ex-commissioner-is-romania-s-new-prime-minister-11-10-2015>

<sup>473</sup> European Commission (2016), ‘On Progress in Romania under the Cooperation and Verification Mechanism’, Progress in Romania under the Cooperation and Verification Mechanism, Report from the Commission to the European Parliament and the Council, COM (2016) 41 final.

<sup>474</sup> Marini, A (2016), Problems In Bulgaria Are Systemic, In Romania – Political. *EU Inside*, Retrieved from: <http://www.euinside.eu/en/news/problems-in-bulgaria-are-systemic-in-romania-political>.

Romanian Prime Minister Adrian Nastase to two years in prison.<sup>475</sup> The court also banned Nastase from running for public office. Then, former Prime Minister Nastase was found guilty of having illegally funded his presidential election campaign in 2004. He used his position as the head of the Romanian government to illegally collect about €1.6 million from various companies by officially announcing their payments as attendance fees for a governmental symposium.<sup>476</sup> The Romanian political system in the last few years has turned out to be a period of some success in fighting corruption. In particular, from April 2011 until October 2013, the Court handed down no fewer than eleven verdicts in corruption cases against former members of government.<sup>477</sup> Since 2011, there is evidence that high elected public office holders were successfully put on trial for the first time since the collapse of communism. These positive developments were promising evidence to the EU that Romania had the will to tackle corruption in the political system. Also, it brought some public trust to the Romanian judiciary and holding their elected officials accountable.<sup>478</sup>

Some of the political cases that were subject of investigations, as highlighted above, are an indication of the seriousness of the corruption imbedded in politics. In Romania in the last ten years, there were no less than two Prime Ministers, 21 ministers and 19 secretaries of state subject to investigation by the prosecution offices for acts committed in the exercise of their public office.<sup>479</sup> The EU, civil society actors and media began to dominate the political discourse in Romania at the beginning of the year 2000<sup>480</sup> as a result, numerous laws and regulations have been implemented

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<sup>475</sup> Buckley, N (2014), Former Romanian prime minister jailed for taking bribes. *The Financial Times*, 6 January 2014; <http://www.ft.com/cms/s/0/a43e56b8-7707-11e3-a253-00144feabdc0.html#axzz41gLEJh9z>.

<sup>476</sup> Schwindt-Bayer, A. E. and M. Tavits (2016), *Corruption, Accountability, and Clarity of Responsibility*. Cambridge: University of Cambridge Press, p. 7.

<sup>477</sup> Andersson, J and E. Rindzevičiūtė (2015), *The Struggle for the Long-Term in Transnational Science and Politics*. London and New York: Routledge, pp. 165-195.

<sup>478</sup> Börzel, T. A. (2016), 'Coming Together or Drifting Apart? Political Change in New Member States, Accession Candidates, and Eastern Neighbourhood Countries', *MAXCAP Working Paper Series, No. 03, May 2014*, Berlin, Freie Universität Berlin. pp. 16-25

<sup>479</sup> Gallagher, T (2009), *Romania and the European Union: How the Weak Vanquished the Strong*. Manchester: Manchester University Press, p. 205.

<sup>480</sup> Gallagher, T (2009), *Romania and the European Union: How the Weak Vanquished the Strong*. Manchester: Manchester University Press, p. 205.

and amended, as well as new state institutions being established to fight political corruption more efficiently.<sup>481</sup>

The EU has given technical assistance and support to the Romanian anti-corruption institutions over the years and these bodies have developed their own dynamics since 2005. The research can observe that there is an institutional independency of the Romanian law enforcement bodies, which is supported by the fact that these anti-corruption institutions have investigated corruption-related cases committed by members of all political parties.<sup>482</sup> These developments are viewed as positive, but one could argue that they were rather superficial to only get into the European Union.

Since Romania joined the EU, there have been some attempts to develop an effective anti-corruption policy, but the general political environment in Romania has been characterised by instability, which has had a negative impact in building on the progress. In particular, the years 2009 to 2011 were dominated by a deep economic and financial crisis and it prompted governments to take radical steps to obtain IMF bailout loans. This led to a serious loss of popular confidence and culminated in massive street protests which saw a change of two governments in 2009 and 2012.<sup>483</sup> As a result, still after four years of political instability in Romania, the fight against corruption was undermined.

However, after the Government of Ponta came into power the fight against political corruption was relatively stable, even though there were many institutional changes due to changes of administrations, which contributed to the instability and failure to prioritise the fight against corruption. However, as described in the section about the judiciary above, insufficient

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<sup>481</sup> Hipper, M. A (2015), *Beyond the Rhetorics of Compliance: Judicial Reform in Romania*. Freiburg: Springer VS, pp. 25-40.

<sup>482</sup> Schnell, S (2015), 'Mimicry, Persuasion, or Learning? The Case of Two Transparency and Anti-Corruption Policies in Romania', *Public Administration and Development*, **35**(4), pp. 277-287.

<sup>483</sup> Kostadinova, P. and M. Giurcanu (2015), 'Political Blackmail, Institutional Infighting, and Electoral Politics: The Fate of Governing Parties during the Great Recession (2008-12) in Romania and Bulgaria'. *Politics and Policy*, **43**(6), pp. 789-821.



anti-corruption measures still remain as the court proceedings frequently go on for many years. This is caused as a result of the numerous occasions for procedural delays.<sup>484</sup> However, it is also due to the lack of capacity in the justice system and courts frequently hesitate to sentence high-level and high profile corruption cases to long term sentences. The judgments in such high-level corruption cases frequently remain below the legal minimum and about 60% of the sentences are suspended according to the CVM.<sup>485</sup> Thus, such practices on the part of the courts will have no significant deterrent effect and it will be rather superficial. That said, this problem is also due to the fact the judiciary itself is highly affected by corruption, as shown in the section above. Only from 2010 to 2013, four out of about one hundred judges were charged with peddling judicial influence and taking bribes.

As a result of these compliances, three important improvements of the legal framework were made to prevent corruption in politics. Firstly, an amendment to the Constitutional Court Law in September 2010 was made to eliminate the rule which specified that, during concrete review proceedings the related case before the Constitutional Court, which was pending before an ordinary court had to be suspended.<sup>486</sup> Secondly, in July 2011 the ICCJ, which is the High Court of Cassation and Justice in Romania, decided by an interpretative ruling that, for the length of a tangible review before the Constitutional Court, the statute-barred period of the related case has to be extended.<sup>487</sup> Thirdly, in October 2010, the Romanian parliament approved a law known as the ‘Small Reform Law’ according to Hein, which amended the codes of procedure in order to accelerate judicial proceedings.<sup>488</sup> Also, in 2012 and 2013, another four

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<sup>484</sup> Mocanu, M. C (2013), ‘Is The Appeal Against Delay in Court Proceedings a Means of Appeal for Withdrawal?’, *Contemporary Readings in Law and Social Justice*, 5(2), pp. 609-612.

<sup>485</sup> European Commission (2012), On Progress in Romania under the Cooperation and Verification Mechanism, COM(2012) 410 final.

<sup>486</sup> Ducu, A (2013), ‘Could the Present Economic-Financial Crisis Give a New Impetus to the Fight Against Corruption and the Underground Economy?’, *Internal Auditing and Risk Management*, 8(2), pp. 35-46.

<sup>487</sup> Hein, M (2015) ‘The Fight Against Government Corruption in Romania: Irreversible Results or Sisyphean Challenge?’, *Europe-Asia Studies*, 67(5), pp. 747-776.

<sup>488</sup> Hein, M (2015) ‘The Fight Against Government Corruption in Romania: Irreversible Results or Sisyphean Challenge?’, *Europe-Asia Studies*, 67(5), pp. 747-776.

new codes and procedural codes came into force that simplified the proceedings and made it easier to start proceedings to prosecute politicians.

In 2012, the government approved a new ‘National Anti-Corruption Strategy 2012–2015’ drafted by the parliament, which mainly answers the demands and recommendations put forward by the EU Commission and declared that they would no longer misuse their immunity rights that they enjoyed from prosecution. In the National Anti-Corruption Strategy, the parliament formulates the objective to strengthen the integrity of its members. In particular, this is done by amending the regulations of the Chamber of Deputies and the Senate and other legislation in this field, in order to put on the agenda of the first plenary session requests for lifting immunity of Parliamentarians and solve these requests in a maximum of 72 hours.<sup>489</sup> The EU Anti-Corruption Report, in fact, calls for an application of such a rule and that is why it is mentioned as a key issue to be addressed by Romania.

Nevertheless, the government has tried to influence some decisions of the prosecutors and, on purpose in 2012, by delaying the nomination of the new Prosecutor General attached to the ICCJ and the DNA Chief Prosecutor. Since the regular term of the incumbent Prosecutor General was to end in October 2012 and that of DNA Chief Prosecutor Daniel had already expired in February 2012, the Ponta Government delayed the appointment procedures during the summer of 2012 until trying to impeach President Basescu.<sup>490</sup> In doing so, the government attempted to clear the way for an appointment of prosecutors that was much less committed to build on the previous records and be close to the Ponta Government.

After the failure of the presidential dismissal of Basescu, it was not until May 2013 that the then Prime Minister Ponta and President Basescu

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<sup>489</sup> Ministry of Justice, National Anticorruption Strategy for the Period 2012–2015, op. 11, Retrieved on; [http://www.anticorruption-romania.org/docman/doc\\_download/83-nationalanticorruption-strategy-2012-2015-annex-1](http://www.anticorruption-romania.org/docman/doc_download/83-nationalanticorruption-strategy-2012-2015-annex-1)

<sup>490</sup> Kostadinova, P. and M. Giurcanu (2015), ‘Political Blackmail, Institutional Infighting, and Electoral Politics: The Fate of Governing Parties during the Great Recession (2008-12) in Romania and Bulgaria’. *Politics and Policy*, 43(6), pp. 789-821.

reached an agreement on the appointment of the two leading prosecutors. The appointed ones were rather portrayed as the ‘president’s candidate’, who became the DNA Chief Prosecutor and the ‘government’s candidate’, who became the ICCJ Prosecutor General.<sup>491</sup>

The academic discourse in Romania finds that such acts are motivated by the political elite in further politicizing the judicial system. However, what is clear is that, even in some prior successful anti-corruption policies, politicians from all parties use allegations of corruption for other political purposes and these patterns have been highly visible in post-communist transition states. The following section will evaluate the issues concerning corruption in public procurement in Romania.

#### **4.3.4.3 Public procurement**

The EU Anti-Corruption Report suggested that Romania has to take into account the development of effective tools within contracting authorities and public procurement supervisory bodies. The Report suggested that Romania should, in particular, focus on conflicts of interest at local and regional level, as corruption in public procurement in Romania is an area of particular concern to the EU.

According to the 2015 flash Eurobarometer survey on corruption relevant to businesses,<sup>492</sup> more than 34% of EU companies and 51% of Romanian inner companies that participated in public procurement say corruption prevented them from winning a contract. A 2005 survey done by the World Economic Forum, in a sample of 125 countries, placed Romania among the last 25 countries concerning the frequency of bribery and additional payments in public procurement. Thus, compared to ten years ago, Romania has not made enough progress considering all the financial

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<sup>491</sup> Hein, M (2015) ‘The Fight Against Government Corruption in Romania: Irreversible Results or Sisyphean Challenge?’, *Europe-Asia Studies*, 67(5), pp. 747-776.

<sup>492</sup> Eurobarometer (2015) Flash Eurobarometer for Romania, Retrieved from; <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/yearFrom/1973/yearTo/2016/surveyKy/2084>

assistance that it has received from the EU. However, at that time Romania was the only EU candidate country to be placed with such a poor ranking, while most of the EU Member States were placed among the best 25 performers.<sup>493</sup> The 2015 flash Eurobarometer survey shows that nearly 74% of the Romanian population believes that contracts are not awarded in a fair and transparent way.<sup>494</sup> However, the CVM reports are the best source to offer a perspective about corruption in public procurement for Romania.

If one analyses the CVM reports from 2010 to 2014, because the 2016 report is mainly based on judicial independence and judicial reform, there are several common ideas present. Firstly, all the CVM finds that progress seems very inadequate in the prevention and sanctioning of corruption related to public procurement in Romania. The EU Commission finds that the progress made against high-level corruption in general has not been matched in public procurement. Secondly, nearly all of the CVM reports and also the EU Anti-Corruption Report issued in 2014 address similar shortcomings. Those include frequent changes of the legal framework and an institutional set-up that lacks sufficient capacity, as well as the lack of key tools for effective controls such as an inclusive register of public tenders, weak protection of public procurement against conflicts of interest; few cases of conflicts of interest are pursued in public procurement. Thirdly, almost all of the CVM reports, including the EU Anti-Corruption Report, put emphasis on creating ex-ante verifications in order to detect conflicts of interest in the early stages of the award procedure.<sup>495</sup>

The reasons why public procurement procedures in Romania are highly dysfunctional and corrupt are because of the absorption of Structural Funds. Recent studies show that the spending of EU funds across many new and old Member States is a contributing factor to public procurement

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<sup>493</sup> OECD (2013), *Integrity in Public Procurement – Good Practice from A to Z*, Paris: OECD.

<sup>494</sup> National Survey on Public Procurement (2013) Retrieved from <http://ipp.ro/library/IPPP%20ACHIZITII%20PUBLIC%201.pdf>

<sup>495</sup> Sjaafjell, B and A. Wiesbrock (2016), *Sustainable Public Procurement Under EU Law: New Perspectives on the State as Stakeholder*. Cambridge: Cambridge University Press, p.133.

corruption.<sup>496</sup> The researcher argues that this is in the context in which EU funds amount to 1.9% to 4.4% of the GDP and well above 50% of public investment, even if only a fraction of these amounts is impacted by corruption. The EU Commission criticised Romania and pushed for an enforcement of instruments to protect EU funds that were contributing to public procurement contracts. In June 2013, the Romanian government replied to the requests and critiques coming from the EU Commission and adopted a joint ministerial order regarding the support of the guide encompassing the central risks identified in the field of public procurement.<sup>497</sup>

An example of these risks is unjustified shortening of deadlines as a result of the publication of notice of an intention to purchase. Use of an accelerated award procedure can be done only if the emergency situation is clearly justified by the contracting authority and it is not connected to its own fault.<sup>498</sup> This involves putting in place an award criterion, i.e. the most economically advantageous tender, with the inclusion of irrelevant or unquantifiable evaluation factors. Automatic exclusion of the lowest tender occurs, as this is often done based on the justification that such a low price will most likely generate problems during the execution of the contract.<sup>499</sup>

The EU Anti-Corruption Report suggested that Romania build upon these guidelines and make a proper application. However, as the EU Anti-Corruption Report suggested, there are conflicts of interest in awarding public procurement contracts in Romania and appropriate measurements should be taken to prevent such acts occurring. In assessing the problem as

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<sup>496</sup> Fazekas, M., Tóth, I. J., and P.L. King, L. P. (2014), *Are EU funds a corruption risk? The impact of EU funds on grand corruption in Central and Eastern Europe*. Budapest: Corruption Research Centre, pp. 1-23.

<sup>497</sup> Mungiu-Pippidi, A (2015), *A Quest for Good Governance. How Societies Develop Control of Corruption*. Cambridge: Cambridge University Press, pp. 161-185.

<sup>498</sup> Neamtu, B and D.C. Dragos (2015), Fighting Corruption in Public Procurement: The Case of Romania in Gabriella M. Racca - Christopher R. Yukins (eds) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, Bruxelles: Bruylant, pp. 1-22.

<sup>499</sup> Francesco, D (2014), 'Awarding Price, Contract Performance, and Bids Screening: Evidence from Procurement Auctions', *American Economic Journal: Applied Economics*, 6(1), pp. 108-32.

already mentioned above and in the EU Anti-Corruption Report, conflicts of interest represent one of the most widespread forms of corruption in public procurement in Romania. In March 2013, the president of the National Agency for Integrity for Romania, while attending the conference ‘Combating criminality in the field of public procurement, an operational approach’ referring to an internal study conducted by the Agency, declared that at the level of local and county authorities, conflicts of interest are no longer controlled by the state authorities due to a legal framework which is outdated and does not meet the challenges in practice.<sup>500</sup> According to the researcher, more than 78 elected officials at the local level were found to have received and earned public money through public procurement corrupt practices.

In the field of conflicts of interest, the legal and institutional framework has constantly changed in the last ten years. Currently, the Romanian national public procurement legislation does not include a clear definition of conflicts of interest. Instead, the law mentioned several situations that can lead to a case of conflicts of interest.<sup>501</sup> In regard to the persons involved in verifying and evaluating the candidates for tenders, the conflict might be created by an interest that can influence the impartiality and objectivity of those persons throughout the evaluation process.<sup>502</sup> The most recent piece of legislation addressing the issue of conflicts of interest cited that the conflicts of interest should be understood broadly as a conflict between the professional duties and the private interest of a public servant in which it could be observed as having the potential to obstruct upon the independent and objective execution of duties.<sup>503</sup> In the light of this wide definition,

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<sup>500</sup> Freedom House (2013), Public procurement. An operational approach, [Online], 20 March 2013 Retrieved from; <http://freedomhouse.ro/en/index.php/stiri/events/item/134-press-release-conference-public-procurement-an-operational-approach>

<sup>501</sup> European Commission (2016), Country Report Romania on Including an In-Depth Review on the prevention and correction of macroeconomic imbalances, SWD(2016) 91 final

<sup>502</sup> Neamtu, B and D.C. Dragos (2015), Fighting Corruption in Public Procurement: The Case of Romania in Gabriella M. Racca - Christopher R. Yukins (eds) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, Bruxelles: Bruylant, pp. 1-22.

<sup>503</sup> Neamtu, B and D.C. Dragos (2015), Fighting Corruption in Public Procurement: The Case of Romania in Gabriella M. Racca - Christopher R. Yukins (eds) *Integrity and*

even non-patrimonial interests have the potential to influence the behaviour of a person. However, very often the NGOs and the press monitoring the field of conflicts of interest have identified situations presenting conflicts of interest in public procurement.

Researchers find the current legal framework in Romania needs a complete makeover; this has also been suggested by the president of the National Agency for Integrity.<sup>504</sup> Such chances that are needed are observed also in the CVM Report of 2014, as well as in the EU Anti-Corruption Report. The legal and institutional frameworks in place, as found in the research, can no longer provide results in the fight against corruption. The 2014 CVM report suggests that Romania should pay more attention to the prevention side in order to reduce the continuous vulnerability of public procurement procedures towards corruption, and it should establish early detection tools of conflicts of interest through an ex-ante verification procedure of conflicts of interest.<sup>505</sup> This means a combined framework and the cooperation between National Agency for Integrity, the national entity involved in monitoring and sanctioning conflicts of interest in Romania and the governmental agency responsible with monitoring procurement procedures.

What is clear from the research, the CVM Report and the EU Anti-Corruption Report, is that potential conflicts of interest should be identified and avoided in advance before contracts are awarded. Thus, a legal obligation on public procurement authorities to respond to problems identified in both reports will be key to make the system work more efficiently. However, as the previous section on political corruption in Romania showed, during the past five years governments have been very unstable and thus the priority has been more on the judiciary and reforming politics rather than paying more attention to implement new laws to prevent

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*Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, Bruxelles: Bruylant, pp. 1-22.

<sup>504</sup> Freedom House (2013), Public procurement. An operational approach, [Online], 20 March 2013 Retrieved from; <http://freedomhouse.ro/en/index.php/stiri/events/item/134-press-release-conference-public-procurement-an-operational-approach>

<sup>505</sup> European Commission (2016), On Progress in Romania under the Co-operation and Verification Mechanism, COM(2016) 41 final..

clearly conflicts of interest and fight corruption more effectively in public procurement. The next section evaluates the other key area that the EU Anti-Corruption Report identified to have severe problems with corruption.

#### **4.3.4.4 Threat of Corruption in the Healthcare**

The EU Anti-Corruption Report suggests that Romania should implement effective strategies to cut the level of informal payments in the public healthcare system, by considering improving wages and working conditions for medical staff in order to prevent some forms of corruption. Also, the Report suggests that Romania could ensure operational independence of departments within the Ministry of Health and allow for them to control the budget and procurement.

Informal payments in the health care system are becoming an increasingly debated topic, especially in developing and transitional countries in Central and Eastern Europe, and Romania is no exception. Lewis defines informal payments as “payments to individual and institutional providers, in kind or in cash, that are made outside official payment channels or are purchases meant to be covered by the health care system. This encompasses envelope payments to physicians and contributions” to hospitals, as well as the value of medical supplies purchased by patients and drugs obtained from private pharmacies, but intended to be part of government-financed healthcare services. Such informal payments are a form of corruption”.<sup>506</sup>

The health care systems are still underdeveloped across the Central and East European region. This issue involved in the health care system in Romania is complex as in most CEE states, which also encompasses issues related to other areas such as governance, laws, economic and socio-political situation, including levels of corruption, as well as cultures of moral and financial incentives in obtaining services at state facilities. In Romania, out-of-pocket payments have become a common feature for

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<sup>506</sup> Lewis, M (2007) ‘Informal payments and the financing of health care in developing and transition countries’. *Health Affairs*, **26**(4), pp. 984–997.



health care delivery, which is in major contrast to the free-of-charge service provision during Communist times.<sup>507</sup> Patients are now paying either formally or informally to have access to or satisfactory quality for health care. Although some governments in Romania have ignored the existence of informal practices in the health care sector, now there is a recognition by the EU, which is included in the EU Anti-Corruption Report, to drive Romania to adopt strategies to eliminate informal payments in the health care system, which the EU perceives will reduce the level of corruption.

Surveys conducted in Romania find that around almost 56% have paid a bribe to have access to healthcare.<sup>508</sup> The research and reporting on the issue of corruption in healthcare is still not as advanced as in other areas such as shown above in politics or the judiciary, as corruption in healthcare has not been to the concern of the government nor the agenda of the EU to make strategies to implement preventive mechanisms. Even so, the issue is complex and recent reporting on the issue finds that corruption in healthcare has become part of the system and is systematic.

Firstly, doctors in much of Central and Eastern Europe argue that abysmal wages in official health-care systems leave them no choice but to demand payments on the side. In Romania, resident doctors at public hospitals earn just about €200 per month, while specialists earn up to €500.<sup>509</sup> Thus, unsurprisingly, about 7,000 Romanian doctors, that are about 30% of the doctors in the Romania, have emigrated according to the head of the country's college of physicians.<sup>510</sup> Just in Britain's National Health Service

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<sup>507</sup> Bartlett, W., Božikov, J and B. Rechel (2012), *Health Reforms in South East Europe*. New York: Palgrave Macmillan. pp. 130– 147.

<sup>508</sup> Stepurko, T., Pavlova, M., Gryga, I. and W. Groot (2014), 'To pay or not to pay? A multicountry study on informal payments for health-care services and consumers' perceptions', *Health Expectations*, **18**(6), pp. 2978–2993.

<sup>509</sup> The Economist (2015), Patients bearing gifts. In central and eastern Europe, patients offer bribes and low-paid doctors accept them. *The Economist*, 24 March 2015, [Online] Retrieved from <http://www.economist.com/news/europe/21647087-central-and-eastern-europe-low-paid-doctors-accept-bribes-and-patients-offer-them-patients-bearing> (Accessed 18 April 2016)

<sup>510</sup> The Economist (2015), Patients bearing gifts. In central and eastern Europe, patients offer bribes and low-paid doctors accept them. *The Economist*, 24 March 2015, [Online] Retrieved from <http://www.economist.com/news/europe/21647087-central-and-eastern-europe-low-paid-doctors-accept-bribes-and-patients-offer-them-patients-bearing> (Accessed 18 April 2016)

alone, it is estimated that more than 2,000 Romanian doctors are employed.<sup>511</sup>

This is one of the leading factors as to why informal payments occur in the Romanian healthcare system and the situation has got even worse in Romania compared to other EU countries because the country's health-care system is underfunded, and its drug regulation is inadequate. Maria Barbu, a Romania doctor, reported in the Independent in 2014 that she searched for work and the hospital manager wanted €5,000 to hire her in a small town of 8,000 inhabitants.<sup>512</sup> She furthermore gave an insight that, at every step of Romania's doctors and nurses' careers, they must contend with a system that is accused of rewarding bribery and nepotism instead of being based on merit. Research finds that not many of them hold out against this corruption. However, doctors at times also pay money under-the-table in order to secure employment and promotion in the healthcare system.<sup>513</sup> This shows why many doctors supplement their income by receiving bribes and advance or keep their job.

According to Teodora Menea, at the same time patients are willing participants in the bribe-ridden economy, pressing money upon doctors out of gratitude or fear in order to get access to healthcare.<sup>514</sup> Also, given the fact that the very nature of receiving healthcare can be detrimental to someone's life, patients are willing participants in the bribe as long as their health improves. Thus, Menea argues that there has also been a culture of

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<sup>511</sup> Campbell, D., Siddique, H., Kirk, A. and J. Meikle, (2015), NHS hires up to 3,000 foreign-trained doctors in a year to plug staff shortage'. *The Guardian*, 28 January 2015, [Online] Retrieved from <http://www.theguardian.com/society/2015/jan/28/-sp-nhs-hires-3000-foreign-doctors-staff-shortage>

<sup>512</sup> The Economist (2015), Patients bearing gifts. In central and eastern Europe, patients offer bribes and low-paid doctors accept them. *The Economist*, 24 March 2015, [Online] Retrieved from <http://www.economist.com/news/europe/21647087-central-and-eastern-europe-low-paid-doctors-accept-bribes-and-patients-offer-them-patients-bearing> (Accessed 18 April 2016)

<sup>513</sup> Karklins, R (2016), *The System Made Me Do it: Corruption in Post-communist Societies*. London and New York: Routledge, pp. 219.

<sup>514</sup> Manea, T (2015), 'Medical Bribery and the Ethics of Trust: The Romanian Case'. *Journal of Medicine and Philosophy*, **40**(1), pp. 26–43.

social acceptance of informal payments in healthcare and this poses a policy challenge for Romania.<sup>515</sup>

Despite the difference in the overall perceptions regarding cash and in-kind informal payments discussed above, some research finds certain positive and indifferent attitudes towards both types of payments in Romania, though the largest cluster groups are based on negative attitudes.<sup>516</sup> The research analysis finds that, despite the overall public support for the eradication of informal patient payments, these payments are inevitable due to the low funding of the public health care sector. This was also the case with the cancer drug crisis in Romania, where cancer patients struggle every day to find the drugs their life depends on and the government, after facing strong public pressure, lent €800,000 to Unifarm, the Romanian state company in charge of acquiring and distributing drugs to medical institutions around the country to reduce the crisis.<sup>517</sup> Thus, informal patient payments fill the gaps in the public health care system.

Aside from the impact at an individual level, informal payments also have affected the performance of the health care system in Romania as seen above. The effect is observed in their influence on the distribution of services as shown by the example of the supply of drugs shown above and resource allocation. Furthermore, the informal payments are contributing to the obstruction of health care reform, since they create a strong incentive for individuals in high hierarchical positions to block reform attempts. This discussion has been summed up by Gaal and McKee, who proposed two alternative hypotheses: donation and fee-for-service.<sup>518</sup> The donation hypothesis rests on socio-cultural and ethical explanations and involves a

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<sup>515</sup> Manea, T (2015), 'Medical Bribery and the Ethics of Trust: The Romanian Case'. *Journal of Medicine and Philosophy*, **40**(1), pp. 26–43.

<sup>516</sup> Tambora, M., Pavlovab, M., Golinowskaa, S., Sowadaa, C., and W. Groot (2013), 'The formal-informal patient payment mix in European countries. Governance, economics, culture or all of these?'. *Health Policy*, **113**(3), pp. 284–295.

<sup>517</sup> Aggarwala, A., Ginsburg, O and T. Fojo (2014), 'Cancer economics, policy and politics: What informs the debate? Perspectives from the EU, Canada and US', *Journal of Cancer Policy*, **2**(1), pp. 1–11.

<sup>518</sup> Manea, T (2015), 'Medical Bribery and the Ethics of Trust: The Romanian Case'. *Journal of Medicine and Philosophy*, **40**(1), pp. 26–43..

voluntary action on the patient's part, whereas the fee-for-service hypothesis stresses shortage and always involves a certain degree of pressure. As has been witnessed, coercion is not automatically or mainly external but also internal. Although the two hypotheses seem conflicting and mutually exclusive, they could co-exist in Romania as an alternative<sup>519</sup>. Thus, policy efforts to address them may benefit in considering these alternative hypotheses.

The research finds that there is no strategy in Romania, nor is there enough literature addressing the issue of corruption in the healthcare system. Filiasi suggests that the Health Ministry does not have a human resources strategy and a clear strategy for the healthcare system.<sup>520</sup> Furthermore, Filiasi suggests that the Ministry of Healthcare does not collect statistics to show how medicine has changed since and the head of the medical watchdog indicates that the government rejects the criticisms of the underperforming and corrupt system in healthcare.<sup>521</sup> Therefore, despite the fact that informal payments have been reported in Romania, there is still a lack of institutional initiative to address the issue of informal payments in the health care system. The EU Commission's reports criticise Romania for not making enough judicial changes and efforts to fight corruption. Since 2007, when Romania joined the EU, more than €12 million from the EU budget have been invested to support the fight against corruption and judicial reform in Romania<sup>522</sup>. The health care system, on the other hand, seems especially affected by everyday bribery or informal payments. Thus, the situation is quite paradoxical, because Romanians show concern about this kind of

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<sup>519</sup> Manea, T (2015), 'Medical Bribery and the Ethics of Trust: The Romanian Case'. *Journal of Medicine and Philosophy*, **40**(1), pp. 26–43..

<sup>520</sup> Stancu, E (2014) Mass exodus: Why corruption in Romania's healthcare system is forcing its doctors to work abroad. *The Independent*, [Online] Reterived from; <http://www.independent.co.uk/news/world/europe/mass-exodus-why-corruption-in-romanias-healthcare-system-is-forcing-its-doctors-to-work-abroad-9035108.html> (accessed 18 April 2016)

<sup>521</sup> Stancu, E (2014) Mass exodus: Why corruption in Romania's healthcare system is forcing its doctors to work abroad. *The Independent*, [Online] Reterived from; <http://www.independent.co.uk/news/world/europe/mass-exodus-why-corruption-in-romanias-healthcare-system-is-forcing-its-doctors-to-work-abroad-9035108.html> (accessed 18 April 2016)

<sup>522</sup> Manea, T (2015), 'Medical Bribery and the Ethics of Trust: The Romanian Case'. *Journal of Medicine and Philosophy*, **40**(1), pp. 26–43..

small bribery, but at the same time regularly practice it and this makes it harder for policy success. Thus, these informal payments and forms of corruption have an impact on patients, healthcare providers, and the system as a whole, but at the same time there is not a coherent development to address the issue of informal payments in Romania's health care sector.

## 4.4 Albania

### 4.4.1 1990 – 1997: Corruption as a new political chest game

Albania was the last country in South and Eastern Europe in the 1990s to experience the fall of communism.<sup>523</sup> Albania struggled to create stable democratic institutions and proper governmental structures as it was one of the poorest communist countries in Europe and it arguably had the most oppressive communist regime in the entire region. The high degree of oppression under communist rule effectively eliminated all forms of opposition and dissidence. Thus, this slowed down the later transition to pluralism and democracy. Then, in 1991, Albania established itself as a parliamentary representative democratic republic.<sup>524</sup> The Prime Minister became the head of government and the President the head of state. Power is shared between both the government and parliament. The governments since 1992 have been dominated by the Democratic Party and the Socialist Party.<sup>525</sup>

Post-communist politics in the 1990s was characterised by a high degree of political conflict, weak internal party democracy, electoral fraud, parliamentary boycotts, and continuously changing rules of the election game in almost every parliamentary election. A corruption discourse emerged in the government of the Democratic Party, the Albania Conservatives (non-communist party) and the newly reformed Socialist Party (the old communist party), which constantly blamed each other for being more corrupt. However, the notion of corruption was new then to the public sphere in Albania; at that time, some members of parliament opposed the introduction of a legal definition by arguing that, at this point, they still did not know its relevant legal meaning.

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<sup>523</sup> Vickers, M and J. Pettifer (2000), *Albania: From Anarchy to a Balkan Identity*. New York: New York University Press, pp. 55-75.

<sup>524</sup> Vickers, M (2014), *The Albanians: A Modern History*. London: I.B. Tauris and Co. pp 210-235.

<sup>525</sup> Kume, A (2015), 'Study on the Approximation of the Albanian Electoral Legislation with the Code of Good Practice on Electoral Matters of the Venice Commission (EC)', *Academic Journal of Interdisciplinary Studies*, 4(2), pp. 77-84.

Corruption made its first appearance in Albanian legislation in 1991 as a phenomenon that supposedly undermines the freedom and independence of the country. The National Intelligence Service was assigned to fight corruption under this provision. Corruption appeared for the first time in February 1992 as an offence under the Albanian Criminal Code, under the heading of ‘*Political Corruption*’ as ‘*receiving, or accepting to receive, for oneself or for others, a financial or other reward in order to carry out actions that go against the national interests (of Albania)*’<sup>526</sup> The Communist Party that governed Albania during the transition phase introduced this article.

The concept of ‘national interest’ was a term used in the communist era in which it had two meanings. One is national interest in the context of international politics, meaning the interests of a nation state on the international stage.<sup>527</sup> This concept must be contrasted with group interests or international interests. The other is state interest or interests of state as the highest level in national politics, meaning governmental interest or a government that represents the people’s interest.

Thus it makes it difficult to measure and clarify what can constitute going against the national interest in exchange for financial gain and how corruption was viewed as a crime against the national interest in Albania under the criminal code in 1992. What is peculiar is that corruption at this time was viewed in the legislation as a phenomenon that undermined the freedom and independence of the country and the National Intelligence Service would fight it.<sup>528</sup> This indicates that Albania was still not developing proper structures to deal with the issue of corruption and was mainly borrowing phrases from the legislation established by the

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<sup>526</sup> Law No. 7553 (1992), ‘Changes to the Criminal Code of the Republic of Albania’, Tirana, 4 February 1992.

<sup>527</sup> Bogdani, M and J. Loughlin (2007), *Albania and the European Union: The Tumultuous Journey Towards Integration and Accession*. London: I.B.Tauris and Co.. p. 7-14.

<sup>528</sup> Kajsiu, B (2013), ‘The birth of corruption and the politics of anti-corruption in Albania, 1991–2005’, *Nationalities Papers: The Journal of Nationalism and Ethnicity*, **41**(6), pp. 1008-1025.

communist regime. This marked the start of the Albanian political process to cope with hurdles of the communist past in their fight against corruption. Public officials had to adapt to the post-communist political ethos, according to which personal favours from governmental and private sources are no longer acceptable.<sup>529</sup> However, what is clear is that Albania still relied on the National Intelligence Service at this stage, personnel from the secret police structure from the communist era to deal with corruption, rather than an established agency to deal with corruption related cases.

During the beginning of the post-communist era - 1990 to 1997 - corruption became a common topic in the political debate, mainly used for labelling and denigrating the communist elite. The Democratic Party adopted the first anti-corruption legislation after the collapse of communism. It was a Presidential Decree in 1992 requesting for the declaration and verification of wealth for both private businesses and public officials during the period 1990-1992.<sup>530</sup> The Democratic Party supported the Presidential Decree and hailed this effort as a key piece of anti-corruption legislation, because according to the Democratic Party Government at the time, ‘the book of red corruption in Albania was quite thick’.<sup>531</sup> Red corruption referred to the enrichment of the former communists transformed into capitalists; thus, the discourse was to denigrate the previous communist elite as a corrupt clique.<sup>532</sup> This marked the start of the post-communist political battles to use corruption to fight political opponents and distinguish themselves from the communist elite that ruled Albania for almost 50 years. A similar political tactic is witness also in many Central and Eastern European countries.

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<sup>529</sup> Austin, R. C. and J. Ellison (2008), ‘Post-Communist Transitional Justice in Albania’, *East European Politics and Societies*, 22(2), pp. 373-401.

<sup>530</sup> Presidential Decree 203 (1992), On the Declaration and Verification of Earned profit (Për Deklarimin dhe Verifikimin e Fitimeve të Realizuara), Tirana, 5 June, 1992. Published in ‘Journal of Official Acts (Fletorja Zyrtare)’ 3, p. 164.

<sup>531</sup> Kajsiu, B (2015), *A Discourse Analysis of Corruption. Instituting Neoliberalism Against Corruption in Albania, 1998-2005*, London and New York: Routledge, pp. 51.

<sup>532</sup> Musaraj, S (2009), ‘Passport Troubles: Social Tactics and Places of Informal Transactions in Post-Socialist Albania’, *Anthropology of East Europe Review*, 27(2), pp. 159- 175.



The legislation in 1992 became a central tool when the conservative government pushed for prosecuting the communist elite mainly for the mismanagement between 1990 – 1992 on the bases of committing financial crimes during the transition phase.<sup>533</sup> This tactic against the old communist elite was to hold them to account, but not for their political action during the communist era. Instead for financial crimes and, therefore, corruption was frequently used to refer to the communist elite action between the transition phases, 1990-1992 for the betrayals of the national interest in exchange for financial gain. A conservative Minister issued a report on the government mismanagement during 1990-92 and this document became the principal piece of evidence in the trial against the last communist leader, Ramiz Alia and the newly elected chairmen of the Socialist Party Fatos Nano, who were convicted and jailed on corruption charges.<sup>534</sup>

The Report that was used, since the primary evidence was prepared in just over one month in which it became the basis for evidence to charges members of the old regime, in particular the last communist leader Alia.<sup>535</sup> The report was an overview of an audit of the luxurious spending of the communist elite during the transition phase from 1990 – 1992. Evidently, Berisha - the new conservative leader - felt that, in a nation so stricken by poverty and shortages, the public would be more inclined to support actions that focused on financial abuses.<sup>536</sup> One could observe that the Conservative Government at the time after the transition phase had more interest in two things. Firstly, to distinguish themselves and the New Democracy Party as non-communist; secondly, to fight their new political opponents – in particular, the then chairman of the Socialist Party Nano, rather than actually developing an anti-corruption policy field.

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<sup>533</sup> Abrahams, C. F. (2015), *Modern Albania: From Dictatorship to Democracy in Europe*. New York: New York University Press, pp 55-72.

<sup>534</sup> Jeffries, I (2012), *Eastern Europe at the Turn of the Twenty-First Century: A Guide to the Economic Transition*. London and New York: Routledge, pp. 85-91.

<sup>535</sup> Abrahams, C. F. (2015), *Modern Albania: From Dictatorship to Democracy in Europe*. New York: New York University Press, pp. 55-72.

<sup>536</sup> Kajsiu, B (2013), 'The birth of corruption and the politics of anti-corruption in Albania, 1991–2005', *Nationalities Papers: The Journal of Nationalism and Ethnicity*, **41**(6), pp. 1008-1025.

As a result, President Berisha, who was also the leader of the Conservatives at the time, picked ordinary economic issues related to corruption, rather than serious political crimes that could be referred during communist times. It is clear that, up to this time, the anti-corruption policy field had started to slowly emerge with the introduction of the legislation advertising corruption as being against the state interest. However, at this stage it was not intended to build an anti-corruption policy field, but rather to use corruption to fight political opponents, regardless of which party was leading the country after the 1992 general elections.

This was demonstrated in the trial of the last communist leader Ramiz Alia, where he was brought to trial on the basis of corruption, rather than the crimes for which he would have been responsible during the communist era.<sup>537</sup> The intention and efforts of the non-communist Berisha was not to develop an anti-corruption policy. Although he wanted to develop a track record in tackling high-profile cases related to corruption, it was mainly intended to denigrate and destroy key former members of the previous politburo. As observers suggested, President Berisha's government then did not intend to tackle corruption, nor to develop a comprehensive anti-corruption policy field.

His intention to push for investigating and imprisoning former members of the politburo was based on two reasons. Firstly, because President Berisha personally wanted the last communist leader Alia, the wife of the former communist leader Enver Hoxha, and the leader of the Socialist Party Nano, jailed because they symbolised the communist era in the eyes of many Albanians and had to be prosecuted for their leading roles during communist Albania.<sup>538</sup> Secondly, the Berisha Government wanted to clearly distinguish themselves to the international community as non-communist. Corruption here was used as a tool to jail and sentence key members of the previous politburo. The wife of the former communist leader Enver Hoxha

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<sup>537</sup> Jeffries, I (2012), *Eastern Europe at the Turn of the Twenty-First Century: A Guide to the Economic Transition*. London and New York: Routledge, pp. 85-91.

<sup>538</sup> Abrahams, C. F. (2015), *Modern Albania: From Dictatorship to Democracy in Europe*. New York: New York University Press, pp. 55-72.

was sentenced in 1993 for nine years, the opposition and Socialist Party leader Nano was sentenced to twelve years in prison in 1994, and the last communist leader Alia was placed under house arrest in August 1992.<sup>539</sup> Later on, his detention was converted into imprisonment in August 1993. However, they all went free after 1997 and Nano was compensated for the politically motivated prison sentence.

They were imprisoned on the basis of the abuse of power and misappropriation of state funds during 1990 – 1992.<sup>540</sup> The Parliament commission that investigated the activity of the Government of Albania from 1990 – 1992, suggested that the Government at the time abused humanitarian aid given by the Italian state during the economic crisis that lasted from 1990 until early 1992. Thus, using corruption at this stage was a way to imprison the old communist leadership, rather than prosecute them for their involvement in communist administration or crimes that they committed during communist times.<sup>541</sup> By contrast, the circumstances to imprison the opposition and Socialist Party leader Nano for corruption were not mainly driven on an anti-corruption agenda that the government was perusing, but rather political motivations. The Vienna-based International Helsinki Federation for Human Rights claimed that the jailed opposition leader was convicted in politically motivated trials and appealed for release of the opposition and Socialist Party leader.<sup>542</sup> This is a clear example where the government at the time was not focusing on developing an anti-corruption policy field, but uses corruption as a means to jail and prosecute political opponents, including the leader of the opposition. As a human rights activist observed, the Conservatives in government did not simply want to fight corruption at this stage, but win the upcoming elections by

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<sup>539</sup> Jeffries, I (2012), *Eastern Europe at the Turn of the Twenty-First Century: A Guide to the Economic Transition*. London and New York: Routledge, pp. 85-91.

<sup>540</sup> Vickers, M and J. Pettifer (2000), *Albania: From Anarchy to a Balkan Identity*. New York: New York University Press, pp. 247 – 266.

<sup>541</sup> De Waal, C (2007), *Albania Today: A Portrait of Post-Communist Turbulence*. London: I.B. Tauris & Co., pp. 8 – 12.

<sup>542</sup> Vickers, M and J. Pettifer (2000), *Albania: From Anarchy to a Balkan Identity*. New York: New York University Press, pp. 247 – 266

intimidating the opposition.<sup>543</sup> This was clearly evidenced in the 1996 Preliminary elections, where the conservatives won an absolute majority and the election was highly disputed. Human Rights Watch, UN, OSCE, the Council of Europe, the European Union and the United States government called the Albanian government to declare the Albanian 1996 Preliminary elections invalid due to electoral violations and election fraud.<sup>544</sup>

After 1995, corruption shifted as a topic related to administration. In particular, bribery in the public sector became a concern in early 1993 and in 1995 since Albania started to privatise state entities.<sup>545</sup> The Albanian government presented changes to the Albanian Criminal Code as a response to the mounting concern about bribery of public officials. By adding to Article 109 of Albanian Criminal Code that: *'bribe-presenter is freed from criminal charge when he/she reports the act of bribe giving before the start of a legal investigation'*.<sup>546</sup> The purpose of this change was to encourage the reporting of bribery in the public sector, because bribery was understood as corruption. In 1995, the High State Audit was criticised by the public and members of parliament for ignoring claims that corruption had a huge dimension in Albania at this time. This ranged from smuggling of petrol and weapons to former Yugoslavia and the Middle East, and corruption was used as a tool to pass through the border and later also contributed to the rise of the Ponzi schemes in Albania.<sup>547</sup> Corruption at this stage started to be spread out in the black market and informal economy. The director of the high state audit in Albania at the time acknowledged that bribery was a problem in the state agencies and had started to be a common practice. There were claims that government officials fixed and

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<sup>543</sup> Abrahams, C. F. (2015), *Modern Albania: From Dictatorship to Democracy in Europe*. New York: New York University Press, pp. 55-72.

<sup>544</sup> Dawisha, K and B. Parrot (1997), *Politics, Power and the Struggle for Democracy in South-East Europe*. Cambridge: University of Cambridge Press. p.352.

<sup>545</sup> Kajsiu, B (2013), 'The birth of corruption and the politics of anti-corruption in Albania, 1991–2005', *Nationalities Papers: The Journal of Nationalism and Ethnicity*, **41**(6), pp. 1008-1025.

<sup>546</sup> Tahiraj, R (2014), 'Law and Corruption in Albania and in the South-Eastern European Countries: A Comparative Analysis', *Mediterranean Journal of Social Sciences*, **5**(7), pp.136-147.

<sup>547</sup> Kajsiu, B (2015), *A Discourse Analysis of Corruption. Instituting Neoliberalism Against Corruption in Albania, 1998-2005*, London and New York: Routledge, pp. 51-57.

lowered prices in relation to the liberalised prices of the free market to get financial gains.<sup>548</sup> There was a tendency for the use of corruption and it started to emerge in the economy and marked the start of a discourse where corruption was used in the financial sector. However, there was no intention to develop an anti-corruption policy field to address these allegations. They were accepted by public officials, reported in the media, but no one was prosecuted for corruption at this stage. Corruption in public administration and the informal sector was not viewed as a fundamental problem at this stage. Corruption took central stage only in the political discourse where it was used to balm and fight political opponents. However, the emergence of corruption in the black economy and in the financial sector had a huge impact on how Albania reacted after the collapse of the Ponzi scheme in March 1997 and those events shaped how corruption was treated after 1997 in terms of developing an anti-corruption policy field.<sup>549</sup>

During the last period of post-communist Albania, corruption did not have a unified meaning, covering bribery, smuggling, crime, moral degeneration, speculation about alleged corrupt activities. Nevertheless, it is possible to draw some key elements in the way that corruption was used for political purposes during 1990–1997 in Albania. The first anti-corruption legislation was a decree that called for the declaration and verification of wealth for both private businesses and public officials. Thus, this concerned both private and public forms of corruption. The anti-communist discourse, which dominated in 1992 to 1997, was driven based on a political motivation to destroy the communist leadership and their senior associates. During 1991 to 1997, the phrase ‘corruption’ was primarily linked with the transition phase from communism to post-communism and there was no proper cohesion on developing an anti-corruption policy field. As shown above, there was a growing discussion of corruption during the period 1990 to 1997, but there was not any clear intention to develop an anti-corruption

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<sup>548</sup> Kajsiu, B (2013), ‘The birth of corruption and the politics of anti-corruption in Albania, 1991–2005’, *Nationalities Papers: The Journal of Nationalism and Ethnicity*, **41**(6), pp. 1008–1025.

<sup>549</sup> Kaltsounis, T (2010), *The Democratization of Albania: Democracy from Within*. New York: Palgrave Macmillan, pp. 78–80.

policy field. It was only after 1998 that there was an emergence of the anti-corruption policy field in Albania. This was as a consequence of the collapse of the Ponzi schemes- known as the Pyramid schemes in Albania - and the support of international actors to pay closer attention to anti-corruption policy shortcomings in the country.

#### **4.4.2 International support to fight corruption in Albania, 1997-2009**

During the period of 1997 to 2009, Albania witnessed the first attempts to develop a proper anti-corruption policy field. There were internal as well as external factors that drove Albania to shape an anti-corruption policy targeting the fight against corruption at different levels. The new Socialist government that was elected in 1997 made fighting corruption as their key political agenda once in government. In 1998 the Albanian government, with the assistance of the World Bank, introduced the first Albanian anti-corruption strategy.<sup>550</sup> The Albanian government followed the agenda of the World Bank in 1998 to fight against corruption. That said, there were three reasons why the Albanian government introduced the anti-corruption strategy in 1998.

Firstly, the Socialist government wanted to distinguish themselves from the previous Conservative government in their efforts to fight corruption and wanted to strengthen their anti-corruption credentials once they were in government to the Albanian electorate. Secondly, the international actors - mainly the World Bank and IMF - had important leverage on Albania at that time and targeted in restructuring Albania's finances, as well as the government's structure, as a result of the collapse of the economy in 1997. Thirdly, the collapse of the Pyramid scheme in 1997, which was the main factor for the collapse of the economy, the civil unrest, the political turmoil that resulted in new elections to solve the crises – was also the main factor to acknowledge corruption as a central problem that needed to be addressed accordingly through a comprehensive anti-corruption policy. Under

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<sup>550</sup> Albania Council of Ministers (1998), *Combating Corruption in Albania: A Comprehensive Reform Program*. Republic of Albania: Council of Ministers.

pressure, the Socialist government at the time had to respond to these issues and adopted an anti-corruption strategy in 1998.

The Pyramid scheme, as the main factor for the social, economic and political turmoil, saw Albania go through a large reconstruction and, in fact, start building governmental structures from the beginning. Following intense economic reforms after 1992, many considered Albania as a successful model in much of the literature on the economics of transition states as the classic example of sound post-socialist economic policies in line with the 'Washington consensus'.<sup>551</sup> However, this positive progress was rather misleading when the Pyramid scheme collapsed in 1997.

The Pyramid schemes had been operating in Albania for some time since 1992 on an ever increasing scale, and their collapse pulled the country within weeks into chaos, widespread violence, plundering, and food shortages. The common perception of this incident was unexpected from an analytical point of view. Although Albania's IMF-inspired economic reform policies had been widely acknowledged for its good post-communist performance, the unexpected collapse of the Albanian economy was observed firstly as a result of the country's false understating of capitalism.<sup>552</sup>

The Pyramid scheme were schemes, companies and firms, which registered as foundations or charities, but started banking as Ponzi methods. This informal structure of the economic sector was not considered problematic by the financial authorities in Albania at this time and corruption was not an issue. The money-borrowing firms, which were the Pyramid scheme that did not have to report on their sources of capital and loans, were not recorded in their balance sheets. These firms, in contrast to schemes presenting themselves as 'charity foundations', made up for a large part of the Albanian economy during the period 1992 –1997. They took part in

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<sup>551</sup> Bozyk, P (2012), *Globalization and the Transformation of Foreign Economic Policy*. Hampshire: Ashgate Publishing, pp. 211 – 216.

<sup>552</sup> Bezemer, D (2001), 'Post-Socialist Financial Fragility: The Case of Albania', *Cambridge Journal of Economics* 25(1), pp. 1-23.

business trading, tourism, oil, property markets, transport and food processing.<sup>553</sup> The main advantage that Pyramid schemes attracted to savers was the high interest rates. In late 1996 in Albania, the profit was around 50 per cent monthly in these banking firms. The Albanian Conservative government at the time lent some state credibility to these schemes, even though the IMF and World Bank had warned and recommended the Albanian government to closely supervise this foundation. Albanian citizens that invested in these schemes felt that the government supported it because the executives of these pyramid schemes were closely associated with key members of the government, and the government backed this scheme publicly. What is key to note is that most of this Pyramid schemes supported and financed the Democratic Party campaign in the 1996 general election. The schemes had accumulated more than US\$ 1.2 billion, or 50 % of GDP, excluding accrued interest at the time of estimation.

Therefore, it was important for the Socialist government to introduce an anti-corruption strategy and to develop an anti-corruption policy field in addressing many key issues that related to the collapse of the economy in 1997. Moreover, key international actors pushed for reforms to reconstruct Albania's administrative structures. Corruption was observed as a general problem that allowed for the pyramid schemes to rapidly grow and not be properly supervised by the government. Furthermore, the pyramid schemes - through corruption - got support from the conservative government and observers understand that the government did not act earlier due to the influence that these schemes had in Albania. By the end of 1996, the IMF had realised the dangerous magnitudes that Pyramid schemes had accumulated, and warned the Albanian government against them, as the World Bank had been doing publicly since mid-1996 and earlier in government circles.<sup>554</sup> However, since the Parliamentary elections were in 1996, the conservatives in government refused to act before the elections, as it feared that it would have an impact on their general election results.

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<sup>553</sup> Elbirt, C (1997), 'Albania Under the Shadows of the Pyramid Schemes', *Transition: The Newsletter about Reforming Economics*, 8(5), pp. 8 – 10.

<sup>554</sup> Elbirt, C (1997), 'Albania Under the Shadows of the Pyramid Schemes', *Transition: The Newsletter about Reforming Economics*, 8(5), pp. 8 – 10.



For these reasons, the Socialist government wanted to clearly distinguish themselves as being against the Pyramid scheme in 1998. Thus, separating themselves from the policy under the conservatives that were soft on the Pyramid scheme.

After the collapse of Pyramid schemes in 1997, other international actors besides the World Bank influenced the Socialist government to establish an anti-corruption policy field. Research by the World Bank found that bribes were widespread in Albania and this finding was also supported by USAID. USAID funded programmes, initiatives and outreach programmes to educate Albanians against corruption. It also funded research to identify Albanians' attitudes with regards to corruption. The international community, after the collapse of the Pyramid schemes, felt that it was crucial to educate Albanian society in the proper meaning of corruption through public-awareness campaigns that emphasised corruption and bribery, in particular corruption related to the public sector. Furthermore, the international actors saw this period as an opportunity to engage civil society in assisting to shape policy on anti-corruption.

As a consequence, the Albania government introduced changes to the criminal code in 2004. The definition of corruption that entered the Albanian Criminal Code was provided by the Council of Europe, which defined corruption as 'any irregular benefit or a promise for such benefit, for oneself or for other people ... in order to carry out or neglect an action which pertains to his or her function'.<sup>555</sup> The title of Article 259 of the 1995 Criminal Code was changed from 'Asking for a Bribe' to 'Passive Corruption of Persons who Exercise Public Duties'.<sup>556</sup> In other words, 'bribery' was replaced by 'corruption'. Corruption here became restricted to the public sector and was equated with bribery.<sup>557</sup>

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<sup>555</sup> Law No. 9275 (2004), 'On Change in the Criminal Code Approved By the Law 7895, Date 27.01.1995. Penal Code of the Republic of Albania.

<sup>556</sup> Law No. 9275 (2004), 'On Change in the Criminal Code Approved By the Law 7895, Date 27.01.1995. Penal Code of the Republic of Albania.

<sup>557</sup> Kajsiu, B (2015), *A Discourse Analysis of Corruption. Instituting Neoliberalism Against Corruption in Albania, 1998-2005*, London and New York: Routledge, pp. 51-57.

Up to this point Albania was monitored by the IMF, the World Bank, and the Council of Europe to implement a number of internationally recommended reforms that sought to further integrate Albania into the global market and make it more open to international capital. However, for the EU's integration prospects, Albania had to address corruption more critically and establish a comprehensive anti-corruption policy field. The European Commission found that the lack of tackling corruption was largely due to the lack of political will to address corruption as an issue from the Albanian political class. A review of the international anti-corruption effort in Albania argued that the politicians directly or by collusion with criminals, and/or business people steal from the public purse or engage in a range of corrupt strategies. The European Commission around this time started to fund projects against corruption in Albania, which was implemented by the Council of Europe. Through these types of projects, the EU and other international actors that were active in Albania found that civil society perceived that Albania's efforts in fighting corruption were superficial. There was no way for Albania to cure itself of corruption, for it was widespread in every aspect: institutions, politicians, and culture. This meant that the only hope was the intervention and assistance from the outside. There were many reasons why the Albanian anti-corruption policy and efforts were not sufficient: mainly, the lack of political will, the socio-economic issues, and its limited administrative capacities to address corruption as a problem.

In 2006 Albania signed the Stabilization and Association Agreement with the European Union and this marked the start of the influence of the EU to support a far-reaching anti-corruption policy field that would address many parts of Albania's governing structures. The Stabilisation and Association Agreement entered into force in 2009. This agreement was a new process and commitment between the EU and Albania. The Association agreement consisted of new contractual relationships with trade preferences and financial assistance to support the countries' progress in meeting the requirements for EU future membership. In this context, the Stabilisation and Association rests on four building blocks:

- 1) Stabilization and Association Agreement (SAA), which consists of a legally binding agreement between the EU and each country in the SAP;
- 2) Bilateral Free Trade Agreements between all countries participating in the SAP;
- 3) Trade preferences, which unilaterally grant almost totally free access to EU markets for goods from the Balkans; and
- 4) Financial assistance planned in consultation with the partner countries, EU member States and the international community.

The beginning of EU-Albania relations, formal negotiations for a bilateral Stabilization and Association Agreement began in 2003 and until it came into force in 2009. The SAA foresees the establishment of an Association Agreement, which will be implemented progressively over a maximum transitional period. The EU-Albania SAA is extensive and, like all other SAAs, is based largely on the Europe Agreements. It covers a wide range of areas from political dialogue to regional cooperation, and from freedom in the movement of goods, services, workers and capital to mutual co-operation in justice and home affairs.

The Stabilization and Association Agreement was not specifically aimed at Albania as well as the effort of the EU to develop at this time an anti-corruption policy field. The intention of the EU, as was highlighted in 2003 in the EU-Western Balkans summit, was as a result of the Thessaloniki Declaration to integrate the Western Balkans states into the European Union. The EU at this time had an interest to keep stability in the region by offering EU integration – rather than develop an anti-corruption policy field in the Western Balkans.

The Thessaloniki Agenda highlighted the various challenges faced by both the EU and the countries of the region, ranging from security issues, the consolidation of democracy and the rule of law to economic development and regional cooperation. However, organised crime and corruption were observed by the EU as stated in the Thessaloniki Declaration as a real obstacle to democratic stability, the rule of law, economic development and

development of civil society in the region and is a source of concern to EU security.

Once the Stabilisation and Association Agreement entered into force in 2009, Albania was subject to a more rigorous evaluation through the so-called Progress report on an annual basis in which it made key recommendations on specific policy fields. Corruption quickly after 2009 became a key topic every year in the progress report. Thus, it marked the emergence of the EU supporting and requesting Albania to introduce tangible measurements to prevent and fight corruption in more concrete terms. Since 2010, Albania has engaged more closely with the EU in establishing an anti-corruption policy fields by introducing fundamental changes –

mostly changing legislation, developing new structures to address corruption and anti-corruption plans, which all lead to the emergence of a broader anti-corruption policy field covering many sectors that were seen to be prone to corruption. Furthermore, fighting corruption is also a way of passing other key legislation and structural changes to the government.

#### **4.4.3 The EU conditionality and domestic obstacles in develop an anti-corruption policy in Albania**

Post-communist Albania has proven to be one of the most challenging cases for fighting corruption and organised crime, reforming the public administration and the judiciary. Since the successful integration of the Central and Eastern European states into the European Union, the EU wants to try to replicate a similar success in the Western Balkan states. However, the long-standing ethnic disputes, the widespread corruption and organised crime, lack of functional democracy and institutional, weak civil societies and the failure of the full integration of Bulgaria and Romania, have created many barriers for the EU policy's success in the Western Balkans region. The EU established an instrument called the Stabilization Process for the Western Balkans and it was adopted at the Western Balkans Summit in 2003 for the EU key interest in integrating the Western Balkans region into

the European Union.

Albania signed the Stabilization and Association Agreement in 2006 and it came into force in 2009. Since the Stabilization and Association Agreement came into force, Albania has been subject to closer monitoring by the EU in developing meaningful and long-term sustainable reform for the purpose of the European integration process. Since 2009, corruption has been characterized and focused more closely in developing an anti-corruption policy field with the assistance of the EU, as well as other international organisations. In contrast to the first and second period after 2009, the debate about the issue of corruption in Albania has shifted more closing to policy-making. Furthermore, after 2009, the EU has pushed Albania in a direction to establish a policy field that would address corruption in different areas, especially in the judiciary for the sole purpose of joining the European Union.

The EU has produced annually a Progress Report about Albania where it evaluates the Albanians' efforts to address key reforms for the purpose of their European integration process. The EU in their Progress Report, since it started to evaluate Albania more closely, found that corruption is a problematic issue that must be addressed before Albania has any chance of becoming an EU member state in the future. In the latest EU Progress Report for Albania issued on the 10<sup>th</sup> of November 2015, it was clearly stated that Albania must address five key priorities for opening the negotiation process for EU membership.

Those areas are on public administration, judiciary, fight against corruption, fight against organised crime and human rights. These areas are observed by the EU to be fundamentally important for reform in order to have any EU accession success. Corruption is raised as a leading problem in reforming the public administration, judiciary and fight against organised crime. Before evaluating these key areas, which the EU observes to be highly problematic due to the high level of corruption, it is important to highlight first the Albania-EU relationship that lead up to this point where

both the EU and Albania are working to establish an anti-corruption policy field in the country.

#### **4.4.4 Albanian relations with the European Union**

Albania has been an official candidate for accession to the European Union since June 2014 and a member of NATO since 2009. The support for membership in the EU and NATO is amongst the highest in Europe, making this the least controversial issue in Albania. Almost all political parties are in agreement on EU membership just as they were on NATO. This makes these two issues completely uncontroversial and non-opposing. Opposing EU membership would be politically suicidal for any political party, taking into account the high support for European integration among Albanian voters in general. The objective of full EU membership is not questioned, but there are divergent opinions about how to reach it. The political parties frequently try to win votes by promising that they will be the one to lead Albania into the EU quicker than their political opponents.

Following traditional patterns of confrontation, as was observed in the two previous periods of post-communist Albania, in addition to corruption, delaying any EU related policy or reform has become a characteristic of political debate since 2009. The 2013 election was evidence that the Democracy Party that governed Albania from 2005 to 2013 was not able to obtain the EU candidate statutes and had scandals related to corruption. On 23<sup>rd</sup> June 2014, under the Greek EU Presidency, the Council of the European Union agreed to grant Albania candidate status, which was endorsed by the European Council a few days later. As a result, since June 2014 Albania has been a candidate state for EU and has engaged with the EU in a high dialogue discussion since 2014 to develop policies that are key in fulfilling the five main priorities. Before discussing the key priorities that are related to corruption and leading towards developing an anti-corruption policy filed in Albania with the assistance of the EU, it is important to highlight in a chronological order Albania's relations with the European Union to understand how far it took to get into a dialogue for establishing

an anti-corruption policy.

#### **4.4.5 Chronology of the relations of Albania with the European Union**

A Trade and Cooperation Agreement between the EU and Albania were signed in 1992, and Albania became eligible for funding under the EU Phare programme.<sup>558</sup> The Phare programme is a pre-accession instrument for the European Community's financial and technical cooperation with the countries of Central and Eastern Europe. Its objectives concentrate on two key priorities. Firstly, helping the administrations of the countries to acquire the capacity to implement the Community acquis and to assist the national and regional administrations. Furthermore, Phare programme supported regulatory and supervisory bodies in the candidate countries to familiarise themselves with Community objectives and procedures. Secondly, helping the countries to bring their industries and basic infrastructure up to Community standards by mobilising the investment required, particularly in areas where Community rules are increasingly demanding, for instance the environment, transport, industry, product quality, and working conditions.<sup>559</sup>

The EU Council of Ministers in 1997 adopted a regional approach, aimed at strengthening stability in South-Eastern Europe and promoting cooperation between the states in the region. It marked an important development for Albania, Bosnia and Herzegovina, Croatia, Macedonia (FYROM), as the approach established political and economic conditionality as the basis for a transparent policy towards the development of bilateral relations in the fields of trade, financial assistance and economic cooperation, as well as of contractual relations for the development of bilateral relations between these states and the EU.<sup>560</sup>

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<sup>558</sup> Beshku, K. and O. Maltzezi (2013), *Albania and Europe in a Political Regard*. Cambridge: Cambridge Scholars Publishing, pp. 49-51.

<sup>559</sup> Keereman, F. and I. Szekely (2010), *Five Years of an Enlarged EU: A Positive Sum Game – A Positive Sun Game*. London and New York: Springer. pp. 98-104.

<sup>560</sup> Gateva, E (2015), *European Union Enlargement Conditionality*. New York: Palgrave Macmillan. pp. 124-174

In 1999, the EU proposed the new Stabilisation and Association Process (SAP) for five countries of Southeastern Europe, including Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Albania, Montenegro, Serbia, and currently Kosovo under resolution 1244 of the United Nations Security Council.<sup>561</sup> Accordingly, the European Union started to develop new contractual relations with these countries for stabilisation and association agreements. From 1999, Albania started to benefit from Autonomous Trade Preferences with the EU, by extending generalised tariff preferences to Albania. Thus, Albania started to benefit from unilateral trade concession under the EU's autonomous trade measures – AMTs.<sup>562</sup> In the year 2000, an extension of duty-free access to the EU market was also established for products from Albania. By 2005, the EU was Albania's main commercial partner, representing about 74 per cent of Albania's total imports and around 85 per cent of the total exports, making Albania one of the highest EU trade-dependent countries.<sup>563</sup>

The European Council in June 2000 identified that all the Stabilisation and Association Process (SAP) countries are potential candidates for EU membership. At the Zagreb Summit in November 2000, the SAP was officially recognised by the EU and the Western Balkan countries, including Albania.<sup>564</sup> In 2001, the EU established an instrument called the Community Assistance for Reconstruction, Development, and Stabilisation (CARDS) programme specifically designed for the SAP countries to support projects previously funded by the PHARE programmes.<sup>565</sup> The programme was the main financial instrument of the EU's Stabilisation and Association process (SAP). A total of €5.13 billion was secured for all CARDS actions during 2000-2006, as after that day it will be replaced by

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<sup>561</sup> Elsie, R (2010), *Historical Dictionary of Albania*. Second edition. Plymouth: Scarecrow Press, Inc. pp. 130-134

<sup>562</sup> Stahl, J (2012), *Rent from the Land: A Political Ecology of Postsocialist Rural Transformation*. New York: Anthem Press, pp. 125-126.

<sup>563</sup> Bitzenis, A (2009), *The Balkans: Foreign Direct Investment and EU Accession*. Hampshire: Ashgate. pp. 247-250.

<sup>564</sup> Tatham, F.A. (2009), *Enlargement of the European Union*. The Netherlands: Kluwer Law International. pp. 165-170.

<sup>565</sup> Staab, A (2013), *The European Union Explained: Institutions, Actors, Global Impact*. Indianapolis: Indiana University Press. pp. 208-210.



the Instrument for Pre-Accession Assistance (IPA), which will cover both candidate and potential candidate countries.<sup>566</sup>

The Commission recommended in June 2001 for the EU to engage in the negotiations of the Stabilisation and Association Agreement (SAA) with Albania.<sup>567</sup> At the European Council in 2001, they asked the Commission to present a draft negotiating directive for the negotiation of a Stabilisation and Association Agreement with Albania.<sup>568</sup> In October 2002, directives for the negotiation of a Stabilisation and Association Agreement with Albania were adopted on 31<sup>st</sup> January 2003 and the Commission officially launched the negotiations for a Stabilisation and Association Agreement between the EU and Albania.<sup>569</sup> In June 2003 at the Thessaloniki Summit, the Stabilisation and Association Process was defined as the EU policy for the Western Balkans and the EU perspective for these states was confirmed. Thus, countries participating in the SAP started to be eligible for EU accession and would join the EU once they would become ready.<sup>570</sup> The Council of the European Union in December 2005 made the decision on the principles of a revised European Partnership for Albania. On 12<sup>th</sup> June 2006, the Stabilisation and Association Agreement was signed at the General Affairs and External Relations Council in Luxembourg.<sup>571</sup>

The European Commission on 9<sup>th</sup> November 2006 decided to start the visa facilitation negotiations with Albania, and in 13<sup>th</sup> April 2007 the visa

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<sup>566</sup> Geddes, A., Lees, C. and A. Taylor, A. (2013), *The European Union and South East Europe: the dynamics of Europeanization and multi-level governance*. Routledge, (Routledge/UACES contemporary European studies; 21), pp. 153-269.

<sup>567</sup> Peshkopia, R (2015), *Conditioning Democratization: Institutional Reforms and EU Membership, Conditionality in Albania and Macedonia*. London: Anthem Press, pp. 7-18.

<sup>568</sup> Gänzle, S., Grimm, S. and D. Makhan (2012), *The European Union and Global Development: An 'Enlightened Superpower' in the Making?*. London: Palgrave Macmillan, pp. 57-74.

<sup>569</sup> Vasjari, A (2013), 'Albania's Integration in EU', *Mediterranean Journal of Social Sciences*, 4(6), pp. 305-313.

<sup>570</sup> Bindi, F. and I. Angelescu (2012), *The Foreign Policy of the European Union: Assessing Europe's Role in the World*. Washington: Brookings Institution Press, pp. 153-165.

<sup>571</sup> Noutcheva, G (2012), *European Foreign Policy and the Challenges of Balkan Accession: Conditionality, legitimacy and compliance*. London and New York: Routledge, pp. 55-89.

facilitation agreement was reached.<sup>572</sup> The signing by EU Commissioner Franco Frattini cited that this is the first step towards full abolition of the visa requirements and the free movement of Albanian citizens in the EU is a positive step towards future integration into the EU. The visa facilitation agreement entered into force on 1<sup>st</sup> January 2008 and on 7<sup>th</sup> March 2008 the EU Commissioner Franco Frattini opened with Albania a dialogue towards the liberalisation of the visa regime between Albania and the EU.<sup>573</sup> The Stabilisation and Association Agreement ratification process by all the Member States was completed on 14<sup>th</sup> January 2009 and on 1<sup>st</sup> April 2009 the Stabilisation and Association Agreement entered into force. Albania then formally applied for membership in the European Union on 28<sup>th</sup> April 2009.<sup>574</sup>

The Council of the EU asked the European Commission on 16<sup>th</sup> November 2009 to prepare an assessment on Albania's readiness to start accession negotiations with the EU. The Commission submitted the questionnaire on accession preparation to the Albanian government.<sup>575</sup> Albania submitted answers on the 14<sup>th</sup> April 2010 to the European Commission's questionnaire, but the EU did not grant candidacy status in December 2010 due to the long-lasting political row in the country, as well as the high levels of corruption.

The European Commission proposed visa free travel for Albania on 27<sup>th</sup> May 2010. The adopted proposal will enable citizens of Albania to travel to Schengen countries without needing a short-term visa.<sup>576</sup> The Council of the European Union on 8<sup>th</sup> November 2010 approved visa-free travel to the Schengen Area for Albanian citizens. The visa-free access to the Schengen

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<sup>572</sup> Ceccorulli, M. and N. Labanca (2014), *The EU Migration and the Politics of Administrative Detention*. London and New York: Routledge, pp. 23-42.

<sup>573</sup> European Communication (2008), *Commission launches dialogue with Albania on visa liberalization*. COM(2008) 127 final.

<sup>574</sup> Elsie, R (2010), *Historical Dictionary of Albania*. Second edition. Plymouth: Scarecrow Press, Inc. pp. 130-134

<sup>575</sup> Paul, P. C, and B. De Búrca, (2011), *The Evolution of EU Law*. Oxford: Oxford University Press. pp. 188-215.

<sup>576</sup> Eisele, K (2014), *The External Dimension of the EU's Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective*. Leiden and Boston: Brill Nijhoff, pp. 278-284.

area entered into force on 15<sup>th</sup> December 2010 and on 10<sup>th</sup> October 2012 the European Commission recommended that Albania be granted EU candidate status, subject to the completion of key measures in certain areas.

The Albanian parliament in August 2012 rejected a proposal by the EU to abolish immunity for parliament members, ministers, key judges and individuals in some other public offices. The EU required this to be abolished, along with eleven other key issues. As a result, the candidate status was further delayed for Albania.<sup>577</sup> A constitutional amendment was unanimously passed in September 2012 that limited the immunity of parliamentarians and other key positions that had immunity in Albania.<sup>578</sup> The EU Commission saw the immunity of high public office holders as an obstacle in terms of prosecuting high-level officials against corruption related cases and pushed Albania to lift the immunity of public office holders.

The European Commission evaluated the progress of Albania in October 2012 to comply with twelve key conditions to achieve official candidate status and start accession negotiations. Only four key priorities were found to be met, while two were well into progress and the remaining six were in moderate progress.<sup>579</sup> The report suggests that, if Albania managed to hold a fair and democratic parliamentary election in June 2013, and also implemented the remaining changes to comply with the eight key priorities even though not fully met, then the Council of the European Union would recommend granting Albania official candidate status. Albania held a general election on 23<sup>rd</sup> June 2013, generally regarded as free and fair – thus satisfying the EU request which would recommend Albania for EU

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<sup>577</sup> Gjipali, G (2012), Freedom House Annual Report on Albania. Retrieved from; [https://freedomhouse.org/sites/default/files/NIT13\\_Albania\\_3rdProof\\_0.pdf](https://freedomhouse.org/sites/default/files/NIT13_Albania_3rdProof_0.pdf)

<sup>578</sup> Vorpsi, A. (2014), Legal adviser at the Constitutional Court of Albania. Retrieved from; <http://constitutional-change.com/is-there-a-need-of-a-deep-constitutional-reform-in-albania/>

<sup>579</sup> Carey, F. H. (2014), *European Institutions, Democratization, and Human Rights Protection in the European Periphery*. London: Lexington Books, pp. 338-347.

candidate status.<sup>580</sup> On July 17<sup>th</sup>, the EU delegation to Albania cited that Albania had met many of these conditions, and could become an official candidate by December 2013.

The European Commission on 16<sup>th</sup> October 2013 issued its annual report and concluded that the Albanian election was held in an orderly manner in which progress was made in meeting other conditions. As a result, the EU Commission recommended granting to Albania the EU candidate status.<sup>581</sup> The EU Parliament meeting on 5<sup>th</sup> December 2013 suggested that the Council should acknowledge the progress made by Albania by granting it EU candidate status without undue delay. However, several EU member states, in particular Denmark and the Netherlands, remained opposed to granting Albania candidate status until it demonstrated that its recent progress could be sustained. Thus, at its meeting in December 2013, the Council of the European Union decided to postpone the decision on candidate status until June 2014 to see evidence of whether recent progress could be sustained and there was a clear effort to fight corruption and organised crime in particular.<sup>582</sup> Under the Greek EU Presidency on 24<sup>th</sup> June 2014, the Council of the European Union agreed to grant Albania the EU candidate status, which was endorsed by the European Council a few days later. This did coincide with the 10th anniversary of the ‘Agenda 2014’, proposed by the Greek Government in 2004, as part of the EU-Western Balkans Summit in Thessaloniki, for boosting the integration of all the Western Balkan states into the European Union.<sup>583</sup>

At the fifth High Level Dialogue meeting between Albania and EU in March 2015, the EU Commissioner for Enlargement informed Albania that, for the EU to open accession talks, Albania was still required to meet two

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<sup>580</sup> Peshkopia, R (2015) Peshkopia, R (2015), *Conditioning Democratization: Institutional Reforms and EU Membership, Conditionality in Albania and Macedonia*. London: Anthem Press, pp.177-182.

<sup>581</sup> McGowan, L and D. Phinnemore (2015), *A Dictionary of the European Union*. London and New York: Routledge, pp. 9-11.

<sup>582</sup> Eva Teqja (2014), ‘Western Balkans, the long way of integration: Albania’s perception about the process’, *Journal of Global Faultlines*, 2(1), pp. 70-94.

<sup>583</sup> McGowan, L and D. Phinnemore (2015), *A Dictionary of the European Union*. London and New York: Routledge, pp. 9-11.

key conditions.<sup>584</sup> Firstly, the government needs to reopen political dialogue with the parliamentary opposition. Secondly, Albania must deliver quality reforms for all five earlier identified areas – i.e. reforming the public administration, rule of law, fighting corruption and organised crime, and respect of human rights.<sup>585</sup> This official stance was fully supported by the European Parliament through its pass of a Resolution comment in April 2015, which essentially approved with all conclusions drawn by the Commission's 2014 Progress Report on Albania.<sup>586</sup> The Government outlined the next step would be to submit a detailed progress report on the implementation of the five key reforms to the Commission in Autumn 2015 with hopes to start the accession negotiations process in late 2016.<sup>587</sup>

The Commission's 2015 Progress Report on Albania issued on 10<sup>th</sup> November 2015 emphasises the importance of addressing these five key priorities and gave recommendations as to what Albania should do that will help with the EU accession negotiations process.<sup>588</sup> From the EU Commission's 2015 Progress Report on Albania, it can be observed that corruption is a problem especially in the public administration sector and the judicial system. In the following section, there will be an analysis and overview on how the EU has identified these areas and whether Albania has developed an anti-corruption policy field with the assistance of the EU in the public administration and the judiciary.

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<sup>584</sup> European Union (2015), Albania Joint Conclusions on the Fifth High Level Dialogue on the Key Priorities, 24 March 2015, Retrieved from; [http://eeas.europa.eu/delegations/albania/documents/press\\_releases/20150324\\_5th\\_hld\\_operational\\_conclusions.pdf](http://eeas.europa.eu/delegations/albania/documents/press_releases/20150324_5th_hld_operational_conclusions.pdf)

<sup>585</sup> European Union (2015), Albania Joint Conclusions on the Fifth High Level Dialogue on the Key Priorities, 24 March 2015, Retrieved from; [http://eeas.europa.eu/delegations/albania/documents/press\\_releases/20150324\\_5th\\_hld\\_operational\\_conclusions.pdf](http://eeas.europa.eu/delegations/albania/documents/press_releases/20150324_5th_hld_operational_conclusions.pdf)

<sup>586</sup> European Parliament (2015), Resolution on the 2014 Progress Report on Albania. Retrieved from; <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2014/2951%28RSP%29>

<sup>587</sup> European Union (2015), Albania Joint Conclusions on the Fifth High Level Dialogue on the Key Priorities, 24 March 2015, Retrieved from; [http://eeas.europa.eu/delegations/albania/documents/press\\_releases/20150324\\_5th\\_hld\\_operational\\_conclusions.pdf](http://eeas.europa.eu/delegations/albania/documents/press_releases/20150324_5th_hld_operational_conclusions.pdf)

<sup>588</sup> Commission Staff Working Document (2015), Albania 2015 Progress Report. Retrieved from; [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_albania.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_albania.pdf)

#### **4.4.5.1 Reforming the Public Administration**

The European Commission suggested that Albania has to reform its public administration, because corruption is a prevailing issue. Furthermore, the Albanian public administration is not impartial from political affiliations. The EU suggested steps that are necessary to make progress in reforming the public administration to prevent corruption and establish a professional public administration in Albania. The Commission suggested in the joint EU and Albania working groups that Albania needs to adopt a Public Administration Reform (PAR) Strategy to ensure financial sustainability. Further efforts must be made by Albania in implementing the amendments to the Civil Service Law (CSL) and ensure transparency, objectivity and meritocracy in selection procedures for low and middle level managers. In other words, recruitment should be done on the bases of merit, not on political affiliation, as the current practice leads to corrupt practices by close network groups. In addition, Albania needs to ensure that further training is provided to all human resource management units, including in the new local government units for a collective and clear implementation of the applicable legislation. The EU is paying key attention to the application of the legislation in Albania, not the lack of any legislation or clear policy. Furthermore, Albania lacks the proper application of the Law on the Organisation and Functioning of the Public Administration to establish efficient public administration structures, and make efforts to reduce corrupt practices in the public administration.

The Commission recommended Albania to take concrete measurements to enhance the independence and the monitoring capacity of the Ombudsman and the Supreme State Audit in their areas of competence, and ensure proper follow-up to their findings and recommendations. The Commission has also recommended that Albania will need to ensure that the draft Code of Administrative Procedures is fully in line with EU/SIGMA best practices. Albania was also encouraged to take steps for a full implementation of the Law on High State Control, as well as further measurements for strengthening the capacity and independence of the

Supreme State Audit Institution. Furthermore, the Commission encouraged Albania to address existing challenges related to independent institutions by exploring the option of putting in place a horizontal legal framework. This procedure would enact the appointment and dismissal of directors of independent institutions, a merit-based, transparent selection process of their members, and guarantees their institutional autonomy.

All of the recommendations in the latest progress report made by the Commission for reforming the Public administration in Albania can be understood as requiring Albania to adopt EU good governance norms. The EU, in other words, hopes to see that there is more transparency, non-politically influenced independent institutions, open government, and an effective civil service in Albania in which staff are recruited in an open and merit-based selection policy. This approach is also contributing to the broader frame of establishing an anti-corruption policy filed in Albania by addressing key areas such as the public administration. Albania is a challenge case in reforming the administrative structure and preventing corrupt practices, as the research will show in the following part. There are some limitations insofar as the recommendations by the EU can play a supporting role in Albania to make concrete changes in reforming the public administration and reducing the level of corruption. Nevertheless, there is an opportunity to develop an anti-corruption policy field that will also reform sectors such as the public administration.

Post-communist Albania has proven to be a challenging cases for successful administrative reform and fighting corruption within the system, because from the first election in 1992 up to the last election in 2013, every political party that comes to power fills the state institutions with its own people.<sup>589</sup> Thus, the change of the administrative structure inherited from the communist regime has developed in a way closely related to the legacy of the one party-state, which dominates all levels of state administration to the

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<sup>589</sup> Kajsiu, B., Bumci, A. and A. Rakip (2015), *Albania – A Weak Democracy a Weak State: Report on the State of Democracy in Albania*. Tirana: Albanian Institute for International Studies. Retrieved from; <http://www.aiis-albania.org/?q=node/177>

political party in government. The European Union recommendations for the development of a permanent and professional administration regulated by specific laws has still to come to terms with the paradoxical reality of continuing politicisation of the post-communist administration in Albania.<sup>590</sup>

The electoral victory of the Democratic Party in the first phase of post-communist Albania brought the radical anti-communist agenda to the very heart of the post-communist administration programme. Although the first Democrats government contained a group closely-related to the former regime, most communist-era employees were widely seen as a bearer of that system and not suitable for any kind of partnership for the new regime created after 1992.<sup>591</sup> Given the lack of independent employees, the next step was to fill state structures with anti-communist activists who lacked any relevant experience and specialities. The post-communist regime had limited options of independent professionals and expertise, but a new administration containing party loyalists and anti-communist activists was possibly even more poorly-equipped to handle the challenges of transition than the prior communist-era administration would have been.<sup>592</sup>

The influence of the anti-communists in reorganising the state administration was mainly facilitated by the absence of a proper framework for guaranteeing the independence and safeguarding of public employees from any undue political influence. The notion of separating the administration from the party in government, not to even mention a career management system, was completely foreign to the Albanian establishment after the mid-1990s, when the government approved the first-ever civil service law. Until its acceptance, the working status of all public employees

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<sup>590</sup> Dhimitri, E., Gabeta, A. and M. Bello. (2015), 'Regional Development Theories and Modes, A Comparative Analyse. Challenges of Regional Development in Albania. *The USV Annals of Economics and Public Administration Journal*, **15**(2), pp. 50-58.

<sup>591</sup> Elbasani, A. (2013), 'Europeanization Travels to the Western Balkans: enlargement strategy, domestic obstacles and diverging reforms', In A. Elbasani (eds *European integration and transformation in the Western Balkans. Europeanization or business as usual?* London and New York: Routledge, pp. 3-22.

<sup>592</sup> Kajsiu, B (2015), *A Discourse Analysis of Corruption. Instituting Neoliberalism Against Corruption in Albania, 1998-2005*, London and New York: Routledge, pp. 93.



was regulated by the temporary amendments of the communist labour code.<sup>593</sup> The labour code permitted the administrators of state institutions, who were by definition political appointees, to fire any workers under their responsibility whenever they thought it was necessary. However, since the same administrators were also allowed to elaborate on reform needs, there were practically no provisions to protect state employees from potential arbitrary decisions by their administrators.<sup>594</sup> Thus, during the first stage of transition between 1992–7, practices established during decades of one-party rule remained. The next stage of reforms between 1997 and 2000 when the Socialist Party came to power after the elections of 1997 with the intervention of the international community, was keen to bring the patched system together and started to reform the public administration. In 1997, the World Bank, EU, European Bank for Reconstruction and Development, and the International Monetary Fund designed a joint Strategy for Recovery and Growth, which highlighted public administration amongst the key elements for future reforms.<sup>595</sup> In particular, the World Bank underlined reforms in governance as one of the central pillars of its intervention and the most significant challenge facing the government of Albania.<sup>596</sup> The government at the end of 1997 formally approved a new Strategy for State Institution and Public Administration Reform (SIPAR), which were entirely funded by foreign agencies. Also, international bodies supported and drafted new legislation to regulate different aspects of state bureaucracy in the period 1997–2000.

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<sup>593</sup> Nunaj, T (2016), ‘The training of Albanian Public Administration: An Analysis of Training Policies and Their Impact in the Professional Development of Civil Servants’, *Journal of Educational and Social Research* MCSER Publishing, 6(3), pp. 149 – 158.

<sup>594</sup> Elbasani, A (2009), ‘EU Administrative Conditionality and Domestic Downloading: The Limits of Europeanization in Challenging Contexts’, *KFG Working Paper Series*, No. 2, July 2009, Kolleg-Forschergruppe (KFG), The Transformative Power of Europe, Free University Berlin. Retrieved from; [http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG\\_2.pdf](http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_2.pdf)

<sup>595</sup> World Bank (1997), *Albania beyond the Crisis: A Strategy for Recovery and Growth*, Report 18658-ALB, Washington, DC: World Bank.

<sup>596</sup> World Bank (2000) *Albania: Country assistance evaluation*, Report 21390. Washington, DC: World Bank.

However, it must be noted that, once in power, the Socialists saw the inherited administrations as politically biased and changed them with their own supporters in key state positions. Although no official data were made public, the estimations that only during the first year of Socialist government, 1,500 - nearly 15 per cent of the total public employees - were released and changed with the incoming party's loyalists.<sup>597</sup> Again, most employees were once again replaced with people chosen on the basis of political connections, rather than the professional expertise needed to carry out the job. The existing legislation, effectively used by the outgoing majority, allowed for a similar reshuffling of the old administration in favour of Socialist loyalists and politically suitable candidates.

This practice has been witnessed again after the 2005 elections. A parliamentary report prepared by the opposition in 2006 revealed that, after the elections, the Democratic Party that won the 2005 election had approved an internal instruction on the prioritization of candidates that have played a distinctive role in elections for employment in state administration.<sup>598</sup> Numerous sources claimed that, only within the first year, around 4,500, or almost half of the overall state administration, were dismissed.<sup>599</sup> The releases included around 1,300 out of 2,500 civil servants. Most places left vacant were filled with political activists. The Parliamentary report, which builds on information provided by State Department statistics, listed a range of cases where public employees were recruited in clear contradiction of the requirements for the position.<sup>600</sup> This practice was further confirmed after the 2009 elections with the inclusion of new coalition parties, which have seemingly placed their own supporters in the ministries and institutions managed by them. One of the scandals

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<sup>597</sup> Freedom House (2008), *Nations in Transit. Country Report: Albania*. Washington: Freedom House.

<sup>598</sup> Škarica, M (2011), 'Public Administration Reforms in a Fragile Institutional Framework: The Case of Albania', *Croatian and Comparative Public Administration Journal*, **12**(3), pp. 210 – 242.

<sup>599</sup> Škarica, M (2011), 'Public Administration Reforms in a Fragile Institutional Framework: The Case of Albania', *Croatian and Comparative Public Administration Journal*, **12**(3), pp. 210 – 242.

<sup>600</sup> Karini, A (2013), 'Aid-Supported Public Service Reform and Capacity Development in Post-Communist Albania', *International Journal of Public Administration*, **36**(7), pp. 469-481.

disclosed by the media in 2011 showed the chairman of the coalition party at the time – instructing its Minister to recruit ‘school friends’ in well-placed positions within the public administration.<sup>601</sup> Similar practices have also been witnessed again after the 2013 elections, when the Socialists were elected to government.

This has become a characteristic in Albania and the party or coalition that is in government makes full use of legal loopholes and inventive strategies that stretch the laws in order to fill state institutions with politically affiliated candidates. At present, civil servants are typically recruited through temporary contracts and not permanent positions.<sup>602</sup> A prime ministerial decree approved in 2004 allows for temporary contractual appointments of civil servants, but limited them to exceptional cases of replacement for up to three months. Though employed through the 2004 decree, contractual employees often keep the position for longer periods, typically until confirmed in the same role through an open recruitment process, which is in fact used to legitimize positions distributed through temporary contracts rather than accept new candidates. An example is the Ministry of Interior, where all 111 winners of recent open competition have been in a working relationship with the institution before. Such practices at the border of legality have served to undermine the procedures for merit-based appointments.<sup>603</sup> The repetition of political control, even when civil service rules were in place, shows the effective resistance of entrusted political interests against legal measurements that seek to reduce the system of politicization.

Many civil servants that have been fired or replaced have been accused of being corrupt or engaged in some form of corrupt activity. Nonetheless, not

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<sup>601</sup> Karini, A (2013), ‘Aid-Supported Public Service Reform and Capacity Development in Post-Communist Albania’, *International Journal of Public Administration*, **36**(7), pp. 469-481.

<sup>602</sup> Elbasani, A. (2013), ‘Europeanization Travels to the Western Balkans: enlargement strategy, domestic obstacles and diverging reforms’, In A. Elbasani (eds *European integration and transformation in the Western Balkans. Europeanization or business as usual?* London and New York: Routledge, pp. 3–22.

<sup>603</sup> European Commission (2010), Commission Opinion on Albania’s Application for Membership of the European Union, COM (2010) 68..

many civil servants have been prosecuted and sentence for engaging in bribery or corrupt activities. The accusations are dropped once they are replaced or a new government takes charge. The changes and replacements in key posts of the government with party loyalists make it hard to determine corrupt practices and identify where corruption takes place. This is because the civil servants that are appointed in key posts could engage in corruption practices, for example giving state contracts, or operating in closed a network, which makes it hard to detect corrupt activities in the public administration, let alone fighting corruption within the public administration.

Therefore, the EU is keen to push Albania for administrative reforms to reduce the corrupt activities and establish an independent public administration at the same time, which is not influenced by parties that are in government. The EU has pushed Albania to involve the recruitment of administration to enact formal legislation and specific personnel management rules in order to build a professional state administration. The EU had previously been involved in the international initiatives to rebuild the Albanian state. However, EU leverage was initially limited to the control of assistance and pressure of aid conditionality applied in concert with other foreign donors. The promise of enlargement policies has activated the policy of EU conditionality and a progressive range of requirements related to public administration.<sup>604</sup> In addition, the SAP II provided new instruments, targeting of specific areas of reform, monitoring the state of compliance, a new programme of aid and assistance, and upgrading of the institutional relations depending on the state of reforms to ensure that the target countries comply with required reforms.<sup>605</sup> However, the task of transforming the public administration, the lack of reformist elites and the undeveloped institutional infrastructure have inhibited a meaningful transformation of the state administration into a depoliticised

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<sup>604</sup> Elbasani, A. (2013), 'Europeanization Travels to the Western Balkans: enlargement strategy, domestic obstacles and diverging reforms', In A. Elbasani (eds *European integration and transformation in the Western Balkans. Europeanization or business as usual?* London and New York: Routledge, pp. 3–22.

<sup>605</sup> IPA (II), Retrieved from; [http://ec.europa.eu/enlargement/instruments/funding-by-country/albania/index\\_en.htm](http://ec.europa.eu/enlargement/instruments/funding-by-country/albania/index_en.htm)

and professional administration as required by the EU.

In terms of developing an anti-corruption policy field, there are some grounds for developing a policy that will address the level of corruption within the system. However, the close network group that each government brings to the public administration makes an attempt to reduce the level of corruption hard to break through. From a reflexive governance theory point of view, the EU recommendations and conditions to reform the public administration are based on some ongoing efforts from Albania to form a professional administration. Nevertheless, it is not clear and one cannot clearly determine whether Albania has the will to establish a professional public administration that is detached from the political parties that govern Albania. There is an ongoing support by the EU in terms of co-finance training to establish a professional public administration and learning from other best practice in the EU. It is safe to evaluate that the EU and Albania are not clearly engaging in a reflexive governance approach, because the EU has requested for Albania to implement key legislation that will protect civil servants. Even so, in terms of developing an anti-corruption policy field, it is reflexive because Albania acknowledges that there is an issue with corruption in the public administration in terms of high level of corrupt practices. The EU is assisting Albania to reform the public administration also to prevent corruption and, as a result, contributing to establishing a broader anti-corruption policy field that also pays attention to corruption in the public administration sector.

In addition to reforming the public administration and addressing the issue of corruption, the EU has identified in its 2015 Progress report that Albania needs to reform the Justice system, as it is observed to be the most problematic sector in Albania and where corruption is broadly widespread. Also, the Judiciary has been a key problem in punishing corruption related cases.

#### 4.4.5.2 Reforming the Justice system

The judicial system in Albania is viewed to be highly problematic and corruption is highly widespread throughout the judicial system. Albania, some key EU member states such as Germany, the Netherlands, the UK as well as the EU have identified that the Justice system is one of the most problematic sectors in Albania and the most corrupt sector. Reforming the Justice system is the key to any future EU membership and there must be a track record in the reform of the justice system. Albania only in July 2016 passed the judicial reform, which will have an impact on reforming the Justice system. The judicial reform that was passed in July 2016 also required for constitutional changes, as special institutions are going to be set up, which will have conditional powers to also fight corruption. Albania, with the pressure of the EU and other international partners - in particular the United States government - engaged in a long process that took over a year and a half, with an objective to reform the judicial system, as well as to build a ground to address and fight corruption in the justice system. This reform is anticipated to be a contribution to the broader anti-corruption policy that Albania is developing with the assistance of the EU as well as the US for the sole purpose of EU membership.

The Judiciary is considered to be one of the most problematic sectors in the country and this is also identified by several sources including Freedom in the World<sup>606</sup> and the Human Rights Report.<sup>607</sup> The law on legal aid was lately improved, but still access to justice is still very much restricted for less fortunate groups of citizens due to high judicial fees, as noted by the European Commission's Albania Progress Report.<sup>608</sup> This perception is also supported by the Global Corruption Barometer 2013,<sup>609</sup> which reports that

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<sup>606</sup> Freedom House (2015), Report on Albania, *Washington DC; Freedom House*.

Retrieved from; <https://freedomhouse.org/report/freedom-world/2015/albania>

<sup>607</sup> Human Rights (2015), Human Rights Report on Albania, *Washington DC*;  
<http://www.state.gov/documents/organization/253027.pdf>

<sup>608</sup> European Commission (2014), Albania Progress Report, COM (2014) 700 final.  
Retrieved from; [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-albania-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-albania-progress-report_en.pdf)

<sup>609</sup> Transparency International (2013), Transparency International Global Corruption Barometer. pp. 16-17. Retrieved from;

more than three-quarters of surveyed citizens perceive the judiciary to be highly corrupt.

The EU, as a result, has funded an EURALIUS IV project, ‘Consolidation of the Justice System in Albania’, under IPA 2013 funds for Albania amounting in total to almost 4 million euros. It started in September 2014 and will last until December 2017. The project supports the Albanian Ministry of Justice, the Office for the Administration of the Judiciary Budget, the High Council of Justice, the High Court, the General Prosecutor Office, the Courts, the National Judicial Conference, the Parliamentary Law Committee, the School of Magistrates, the National Chamber of Advocacy and the National Chamber of Notaries in five areas of intervention. 1 Justice reform and organisation of the Ministry, 2 High Council of Justice and High Court, 3 Criminal justice and prosecution office, 4 Judicial administration and efficiency, and 5 Legal professions and School of Magistrates. These projects are aimed at supporting Albania to reform the judicial system and reduce the level of corruption that takes place within the justice system. This claim was pointed out by the head of the EURALIUS project in Albania.

The head of EURALIUS<sup>610</sup> Mission in Albania, in an interview for the “Voice of America”, emphasised that the whole judicial system in Albania is corrupt. He mentioned that the fact that you know somebody or you pay is understood as something very normal in the Albanian judicial system. Judges demand money, lawyers give money to judges and even prosecutors

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[http://issuu.com/transparencyinternational/docs/2013\\_globalcorruptionbarometer\\_en?e=2496456/3903358#search](http://issuu.com/transparencyinternational/docs/2013_globalcorruptionbarometer_en?e=2496456/3903358#search)

<sup>610</sup> EURALIUS IV project, “Consolidation of the Justice System in Albania”, funded by EU, started in September 2014 and will last until December 2017. With its five areas of intervention, the project will support the Albanian Ministry of Justice, the Office for the Administration of the Judiciary Budget, the High Council of Justice, the High Court, the General Prosecutor Office, the Courts, the National Judicial Conference, the Parliamentary Law Committee, the School of Magistrates, the National Chamber of Advocacy and the National Chamber of Notaries as its main beneficiaries. The project comprises ten full time top experts from EU Member States and Albania, sitting in the premises of the main beneficiaries. Retrieved from; <http://www.euralius.eu/en/about-us/what-we-do>

take money,<sup>611</sup> and this makes it extremely difficult in successfully reforming the judicial system. Thus, making it very difficult to develop a coherent anti-corruption policy to address the issue of corruption in the judicial system. The head of EURALIUS believes that the first solution would be to have an independent institution, such as the High Council of Justice, that should start taking extremely harsh measurements against every kind of form of corruption. In addition, the High Council of Justice should not be politically influenced and the appointment of judges must become transparent. All measurements that have been taken in the last years to discipline corrupt actions are not sufficient enough and have mainly been just a facade to show to the European Union that Albania is doing something about tackling corruption in the justice system, according to the head of EURALIUS Mission in Albania.

The chairman of the Albanian parliamentary commission on justice sector reform in August 2015 also endorsed the EURALIUS and EU position on the justice system, and the claims of dealing with high levels of corruption in the justice system. The parliamentary commission on justice sector reform acknowledged the current situation to be highly critical and has observed that the justice system doesn't need just a makeover but a thorough surgical intervention.<sup>612</sup>

The EU Commission has suggested that it is critical for Albania to reform and tackle the high level of corruption in the judicial system for any future EU membership success and this stand has been supported by a few key EU member states in particular Germany. The EU Member States have highlighted the concerns that investors from EU states are cancelling projects that would create jobs because of the corruption that exists in the justice system. The Ambassador of the United Kingdom in Albania noted that legislation against corruption and bribery in the country makes it

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<sup>611</sup>Urias, J (2014), The whole judicial system in Albania is corrupt. *VOA*, [Online] 29 May, Retrieved from; <http://www.infocip.org/en/?p=1199> (Accessed 28 Sep. 2016)

<sup>612</sup> Bogdani, A (2015), Albanian Justice System Slammed as Totally Corrupt. *Balkan Insight*, [Online] 5 June 2015, Retrieved from; <http://www.balkaninsight.com/en/article/judges-in-albania-pays-up-to-300-000-for-their-positions-report-says>



almost impossible to invest in the current corrupt environment in Albania.<sup>613</sup>

The Commission suggested in the joint EU and Albania working groups that Albania needs to show progress on the judicial reform in relation to the main components of the reform process that Albania will take between 2016 – 2018. This is particularly true in implementing the constitutional changes, criminal justice, legal education, efficiency of justice, legal professions, and the fight against corruption in the judiciary.<sup>614</sup> The ad hoc Parliamentary Committee on Judicial Reform is required to submit a written report to the EU Commission upon completion of each of the stages of progress on these main components, including on the degree of inclusiveness, the participation of key judicial bodies and institutions.<sup>615</sup> This can be observed as a process where Albania - with the assistance of the EU - is developing an anti-corruption policy field that will cover also the sector of the justice system. In terms of a reflexive governance approach, the EU here is supporting the ongoing efforts that Albania is making in fighting corruption in the judiciary. This is even though, as pointed out above, the efforts so far have been merely a façade, rather than concrete efforts to fight corruption in the justice system.

The Commission has asked Albania to provide information on the state of preparation of the Justice Reform Strategy (2014-2020) and on efforts made to prepare for sector budget support.<sup>616</sup> Albania is required to also report on the outcome of the working groups on the Justice Reform Strategy,

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<sup>613</sup> British Embassy Albania (2015), Analysis of the Justice System in Albania-2015, [Online] 13 July 2015, Retrieved from; <https://www.gov.uk/government/world-location-news/analysis-of-the-justice-system-in-albania-2015> (Accessed 28 Sep. 2016)

<sup>614</sup> European Union (2015), Albania Joint Conclusions on the Fifth High Level Dialogue on the Key Priorities, 24 March 2015, Retrieved from; [http://eeas.europa.eu/delegations/albania/documents/press\\_releases/20150324\\_5th\\_hld\\_operational\\_conclusions.pdf](http://eeas.europa.eu/delegations/albania/documents/press_releases/20150324_5th_hld_operational_conclusions.pdf)

<sup>615</sup> European Union (2015), Albania Joint Conclusions on the Fifth High Level Dialogue on the Key Priorities, 24 March 2015, Retrieved from; [http://eeas.europa.eu/delegations/albania/documents/press\\_releases/20150324\\_5th\\_hld\\_operational\\_conclusions.pdf](http://eeas.europa.eu/delegations/albania/documents/press_releases/20150324_5th_hld_operational_conclusions.pdf)

<sup>616</sup> European Commission (2014), IPA (II) Indicative Strategy Paper for Albania (2014-2020), pp. 16-19. Retrieved from; [http://ec.europa.eu/enlargement/instruments/funding-by-country/albania/index\\_en.htm](http://ec.europa.eu/enlargement/instruments/funding-by-country/albania/index_en.htm)

including the review of the Code of Criminal Procedure. It can be observed that the EU is checking Albania, if they can prepare a strategy until 2020 for reforming completely the justice system. From a reflexive governance perspective, the EU is not directly engaging with Albania in a reflexive approach, but there are elements where the EU will support in co-financing in the preparation of the Justice Reform Strategy.

The Code of Criminal Procedure that the EU is suggesting will include draft amendments related to the reduction of the backlog of cases pending at the High Court and the imposition of sanctions on lawyers who delay legal proceedings, which have been reviewed by the Venice Commission, and it suggests that the draft amendments should also be introduced in the Code of Civil Procedure.<sup>617</sup> Changes related to the reduction of the number of judges in civil and criminal panels at the High Court should also be introduced in both Codes. Proposed changes to the Code of Criminal Procedure included in the EC non-paper on short-term measures to improve investigations and in the recommendations on peer assessment review missions on intellectual property rights must also be taken into consideration.<sup>618</sup> The Commission also expects Albania to adopt, in close consultation with EURALIUS, new legislation on the evaluation of judges and on judicial administration, and to finalise the on-going evaluation process of judges.<sup>619</sup> The EU here is working closely with Albania in developing a Code of Criminal Procedure, which could reduce the backlog of cases pending at the High Court and perhaps corrupt acts that occur. It could be observed that the EU, along with the Venice Commission, is supporting Albania to develop this legislation, such can be observed that it will help in developing an anti-corruption policy field in Albania.

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<sup>617</sup> European Commission (2014), Democracy through law - Venice Commission, CDL-REF(2014)015, pp. 2-15. Retrieved from; [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2014\)015-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2014)015-e)

<sup>618</sup> European Commission (2014), Albania Progress Report COM (2014) 700 final of 8.10.2014.

<sup>619</sup> Strategy on Justice System Reform Strategy Project (2015), Ad Hoc Parliamentary Committee on Justice System Reform Group of High Level Experts. pp. 2-4. Retrieved from; [http://www.euralius.eu/images/Justice-Reform/Strategy-on-Justice-System-Reform\\_24-07-2015.pdf](http://www.euralius.eu/images/Justice-Reform/Strategy-on-Justice-System-Reform_24-07-2015.pdf)

Furthermore, the Commission has requested that Albania should publicise all court rulings in a transparent way, with their respective reasoning and in line with data protection requirements. A searchable database for all legislative acts should be set up and become more transparent for the public to view.<sup>620</sup> In addition, Albania is required to provide training activities for judges and prosecutors on the EU acquis and ensure that judges and prosecutors are subject to a thorough and systematic declaration and audit of assets.<sup>621</sup>

However, the most important issue for Albania is to establish an independent judiciary and reduce the high level of corruption. This is viewed as the most challenging aspect and a report presented in July 2015 by the Parliamentary commission for the justice sector finds some alarming concerns, as well as in the EU Progress Report issued in November 2015.

Among the most alarming findings reported in the dossier is the allegation that judges pay between €100,000 to €300,000 to the High Council of Justice in order to get better posts, such as those judges within rural areas where they are able to collect higher amounts of money in bribes.<sup>622</sup> The 336-page dossier suggests that the corruption cycle begins with police officers who accept cash to destroy evidence, to prosecutors who accept between €1,000 and €2,000 to not press any charges. Furthermore, the report finds that paying a judge to change a sentence allegedly costs between €60,000 to €80,000. The report, which analyses the operations of the Albanian justice system since it was established in its present form in

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<sup>620</sup> European Union (2015), Albania Joint Conclusions on the Fifth High Level Dialogue on the Key Priorities, 24 March 2015, Retrieved from; [http://eeas.europa.eu/delegations/albania/documents/press\\_releases/20150324\\_5th\\_hld\\_operational\\_conclusions.pdf](http://eeas.europa.eu/delegations/albania/documents/press_releases/20150324_5th_hld_operational_conclusions.pdf)

<sup>621</sup> European Union (2015), Albania Joint Conclusions on the Fifth High Level Dialogue on the Key Priorities, 24 March 2015, Retrieved from; [http://eeas.europa.eu/delegations/albania/documents/press\\_releases/20150324\\_5th\\_hld\\_operational\\_conclusions.pdf](http://eeas.europa.eu/delegations/albania/documents/press_releases/20150324_5th_hld_operational_conclusions.pdf)

<sup>622</sup> Analysis of the Justice System in Albania (2015), [Translate: ANALIZË E SISTEMIT TË DREJTËSISË NË SHQIPËRI] Ad Hoc Parliamentary Committee on Justice System Reform Group of High Level Experts. pp. 10-21. see more; [http://shqiptarja.com/pdf/new/analiza\\_e\\_sistemit\\_te\\_drejttesis.pdf](http://shqiptarja.com/pdf/new/analiza_e_sistemit_te_drejttesis.pdf) (Accessed 20 Oct. 2015)

1998, also claims that there is compelling evidence that some judges take bribes from both sides in court cases.<sup>623</sup> Among the publication's recommendations is the removal of the country's president as the head of the High Council of Justice in order to guarantee the independence and impartiality of the courts, and to de-politicize the selection process used to appoint High Court judges.<sup>624</sup>

To sum up, the judicial system is observed and, based on evidence that is highly problematic, corruption appears to be widespread throughout the justice system. Albania has made some efforts to tackle the high level of corruption in the judicial system, but as observed they are very modest and not sufficient enough in addressing the issue of corruption. Thus, there are some efforts to develop an anti-corruption policy in Albania, with support from the EU, to address key outstanding issues related to corruption. The EU has engaged in some aspects in a reflexive governance approach with Albania to develop the grounds for an anti-corruption policy to tackle the issue of corruption by giving assistance for further training, supporting legislation, facilitating peer review to learn from best practice and co-financing with the Albanian government strategies for the next two to six years. These efforts and ongoing activities are a sign that Albania, together with the EU, are developing grounds to establish an anti-corruption policy field that will address corruption in the justice system. The efforts that Albania has made so far have been observed as insufficient in fighting corruption and developing a coherent anti-corruption policy field that addresses corruption in the judicial system, and other key sectors.

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<sup>623</sup> Analysis of the Justice System in Albania (2015), [Translate: ANALIZË E SISTEMIT TË DREJTËSISË NË SHQIPËRI] Ad Hoc Parliamentary Committee on Justice System Reform Group of High Level Experts. pp. 10-21. see more;

[http://shqiptarja.com/pdf/new/analiza\\_e\\_sistemit\\_te\\_drejtjesise.pdf](http://shqiptarja.com/pdf/new/analiza_e_sistemit_te_drejtjesise.pdf) (Accessed 20 Oct. 2015)

<sup>624</sup> Analysis of the Justice System in Albania (2015), [Translate: ANALIZË E SISTEMIT TË DREJTËSISË NË SHQIPËRI] Ad Hoc Parliamentary Committee on Justice System Reform Group of High Level Experts. pp. 42-43. see more;

[http://shqiptarja.com/pdf/new/analiza\\_e\\_sistemit\\_te\\_drejtjesise.pdf](http://shqiptarja.com/pdf/new/analiza_e_sistemit_te_drejtjesise.pdf) (Accessed 20 Oct. 2015)

#### **4.5 Concluding Remarks on the Country Studies**

The EU Anti-Corruption Report and the EU overall had a positive impact in supporting the national anti-corruption discourse in the countries case study above in addressing the issue of corruption in terms of developing national anti-corruption policy. The UK and Romania responded positively to the EU Anti-Corruption recommendations, but they differ when it comes to applying the recommendations into concrete policy actions. In the case of the UK, over the two years of operation of the EU Anti-Corruption Report it had a positive impact in introducing the recommendations into the national anti-corruption policy. The UK in December of 2014 published its first UK Anti-Corruption Plan and in its progress update on the Plan in May 2016 emphasised that of the 66 actions proposed in the Plan 62 actions were delivered. The EU Anti-Corruption Report played a vital role in this process in the UK and therefore it can be concluded that it overall had a positive impact. The UK engaged in reflexive governance in developing its UK Anti-Corruption Plan.

In contrast, in the case of Romania, the EU Anti-Corruption Report over the course of two years had rather limited results in implementing the Report's recommendations into concrete policy actions. The efforts by Romania since the Report was published were focused mainly on strengthening Romania's National Anticorruption Directorate. Furthermore, the political turmoil in November 2015, with the collapse of Victor Ponta's government because of allegation to corruption and the formation of a technocratic government led by Dacian Ciolos, a former EU Commissioner, which will run the government until parliamentary elections in end of 2016, have contributed to the difficulties in implementation of the recommendations of the Report in concrete policy actions. Although, in terms of reflexive governance approach the Report had a positive impact in that Romania has engaged with local actors; local issues concerning corruption addressed in the Report were tackled, including the informality and corruption in the public health care system. Therefore, the Report had a positive impact in terms of reflexive governance by mirroring local issues into a more border

EU policy issue cornering Romania. However, in the case of Romania, the reflexive governance approach has not been as successful and additional hard law adopted by the EU can be recommended to develop anti-corruption policy. Romania has mainly responded in develop anti-corruption policy only when the EU and international bodies have threatened Romania with freezing assists or blocking Romania into the passport-free Schengen zone.

While in the case of Albania, its institutional anti-corruption framework introduced with the help of the international community and the EU appears to be promising, it can be concluded that they remain largely ineffective due to a lack of proper implementation because of machine politics and insufficient resources allocated to anti-corruption efforts in Albania. Albanian governments since the collapse of communism have not properly addressed the root causes of corruption and so far have only adopted laws and institutions in line with international standards and the EU requirements with little attention whether and how legislation actually are going to work on the ground. The Albanian governments were able to tick off EU requirements without making serious efforts to make substantive changes in terms of developing a comprehensive anti-corruption policy field in the country. Albania has made little use of reflexive governance, only insofar as involving the civil society and business community in consultation of anti-corruption reforms, rather than involving their findings or recommendation into concrete action plan. The EU interplay with Albania has been based mainly on conditionality set by the Commission. In other words the hard law approach associated with accession rather than a reflexive governance approach characterises the development of the anticorruption policy field in Albania.

## **Chapter 5**

### **5.1 Introduction**

The final chapter summarises results of the foregoing analysis of the EU Anti-Corruption Report and it addresses areas of relevance for future EU Anti-Corruption polices. It is divided into two parts. The first part evaluates achievements in the EU Anti-Corruption Report on efforts to establish a comprehensive anti-corruption policy field. The second part of this chapter offers recommendations for the second EU Anti-Corruption Report and suggests areas that could be given closer attention in future Reports. Both sections offer an assessment from the perspective of the theory of reflexive governance. My analysis provides examples where reflexive governance occurred as a result of the impact that the EU Anti-Corruption Report has, how future Reports could be strengthened by making further use of reflexive governance mechanisms and how reflexive governance can be helpful to Member States in developing their own anti-corruption policies.

### **5.2 The impact of the EU Anti-Corruption Report**

The EU Anti-Corruption Report, published in February 2014 has improved EU Anti-Corruption polices in five key areas over the last two years. First, the Report has officially recognised additional sectors that are vulnerable and prone to corruption practice in the EU and the Member States, in particular in the area of public procurement. Thereby the Anti-Corruption Report raised the awareness of the policy field of corruption in the EU. Second, the Report has offered new insights on the level of corruption and the damaging effects that corruption has in the EU and the Member States. Third, the Report has contributed to thinking about the effect of corruption in economic terms by officially estimated the cost of corruption at EU level, which it identified to be at least 120bn euros (£99bn) annually. Forth, the Report has allowed the EU Commission to engage in a dialogue with Member States and civil society to rethink anti-corruption policy and establish the continuous conditions for mutual learning. As a result both the

EU and Member States can learn from best practice in designing more effective anti-corruption policies and future legislations.

An example where the EU Anti-Corruption Report had an impact was that it has raised the profile of addressing corruption from a policy and law perceptive, thereby pushing up the agenda for fighting against corruption in the EU and the Member States. The EU Anti-Corruption Report itself is a key part of the development of an anti-corruption policy field in the EU and it can be characterised as a flagship monitoring instrument of the EU Commission. The EU Anti-Corruption Report embodies the EU Commission's efforts and commitments to support Member States in recognising their anti-corruption policy shortcomings. In analysing this example from a reflexive governance perspective, it can be argued that this impact has a component of the theory of reflexive governance: innovative problem – solving. The EU Commission, through the EU Anti-Corruption Report, is supporting Member States to acknowledge their anti-corruption policy shortcomings and engaging in an innovative problem – solving exercise to enhance their anti-corruption policies and tools.

Another example where the EU Anti-Corruption Report had an impact was to identify public procurement as a sector that is highly vulnerable to corrupt practices. As a result, the EU Anti-Corruption Report dedicated a thematic chapter to public procurement and accepted the policy shortcomings to address the high level of corruption at EU and Member State level in relation to public procurement.<sup>625</sup> As outlined in the second chapter, public procurement was selected as a case study by the EU Commission to assess the costs of corruption for a sub-sector of the EU economy. The EU Commission, under the thematic chapter in the EU Anti-Corruption Report, can be understood to be trying to trigger a process and a dialogue by which governments at different levels - national, regional, local and other public bodies and as well as non-governmental organisations,

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<sup>625</sup> Christopher, H. B (2014), 'Highlight of the EU Procurement Reforms: The New Directive on Concessions', *European Procurement and Public Private Partnership Law Review*. 9(1), pp.1-2.



NGOs, academia, media - can engage in shaping anti-corruption strategies to prevent corruption in public procurement. Furthermore, the EU Anti-Corruption Report had an impact by further recognising the level of corruption in public procurement and the importance of addressing corruption in this key sector of the economy. Public procurement has a strong economic significance in the EU, with around 20% of the EU's GDP annually spent by government and public.<sup>626</sup> In a global context, public procurement represents around one third of public spending in developed countries. Therefore, corruption in the domain of governmental contracting can have significant economic costs, and it is encouraging in the EU Anti-Corruption Report for the Member States to strongly acknowledge their policy shortcomings in addressing corruption in public procurement.<sup>627</sup> From a reflexive governance theory perspective, this is an example of the reflexive governance component: active participation. Here, in this example, it can be argued that the impact has a reflective governance approach component, active participation, because the EU Anti-Corruption Report has led to wider participation of different levels of government and non-government bodies to engage in shaping anti-corruption measurements to prevent corruption in public procurement.

Another example where the EU Anti-Corruption Report also made an impact is making the EU Member States aware of the risks that corruption poses to EU funds. In Mihály Fazekas's accounts, he argues that EU funds can deteriorate the quality of government; as a result, they increase the risk of corrupt practices.<sup>628</sup> Research suggests that this has been the case in many countries that joined the EU in 2004 and 2007. There are three reasons for this to occur, according to Fazekas. Firstly, EU funds are often

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<sup>626</sup> PwC (PricewaterhouseCoopers) and Ecorys (2013), Identifying and reducing corruption in public procurement in the EU. Development of a methodology to estimate the direct costs of corruption and other elements for an EU-evaluation mechanism in the area of anti-corruption. PwC, Ecorys.

<sup>627</sup> OECD (2013), *Government at a Glance 2013*. Paris: OECD

<sup>628</sup> Fazekas, M., Chvalkovská, J., Skuhrovec, J., Tóth, I. J., and King, L. P. (2014), 'Are EU funds a corruption risk? The impact of EU funds on grand corruption in Central and Eastern Europe.' In

A. Mungiu-Pippidi (ed.), *The Anticorruption Frontline. The ANTICORRP Project, Vol. 2*. Berlin: Barbara Budrich Publishers pp. 68–89.

disbursed on investment projects where public discretion is fairly high and it is acknowledged that discretionary spending is more possibly associated with corruption than non-discretionary spending. Second, EU funds offer a large pool of public resources for rent extraction of public means. Thirdly, EU funds contribute to weakening the relation between domestic civil society, taxation and policy implementation.<sup>629</sup> Thus, as a result, EU Member States are required to make part of their anti-corruption agenda also addressing corruption related to EU funds. From a reflexive governance theory perspective, this is an example of the reflexive governance component: proceduralism. In this example, it can be argued that the impact has a reflective governance approach perspective, because the EU Anti-Corruption Report suggests that the EU funds are exposed to corruption. Therefore, Member States, when designing policy and preventive measurements in the future, could also consider to include protection of EU funds. In other words, Member States after the EU Anti-Corruption Report are reflecting in their own anti-corruption policy shortcomings in addressing EU funds. What is more, the Report has encouraged Member States, when designing future policy in areas related to EU funds, to take into account also including preventative measurements to protect EU funds against corrupt practices. Therefore, it can be argued from a reflexive governance point of view that the impact here in the EU Anti-Corruption Report embodies a reflexive governance component: proceduralism.

Another example where the EU Anti-Corruption Report had an impact was to further highlight the association of corruption in different areas and thus undermine policy success. For instance, corruption supports organised crime and criminal organisations to thrive in their licentious activities; corruption undermines the functioning of the rule of law; a high perception of corruption reduces voters' turnouts in national parliamentary elections

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<sup>629</sup> Fazekas, M., Chvalkovská, J., Skuhrovec, J., Tóth, I. J., and King, L. P. (2014), 'Are EU funds a corruption risk? The impact of EU funds on grand corruption in Central and Eastern Europe.' In A. Mungiu-Pippidi (ed.), *The Anticorruption Frontline. The ANTICORRP Project, Vol. 2*. Berlin: Barbara Budrich Publishers pp. 68–89.

and lowers trust in EU institutions.<sup>630</sup> Member States have taken into account and have accepted the association of corruption that it also affects other sectors as stipulated in some of the examples above. However, the impact of the EU Anti-Corruption Report to this stage has not had a direct influence on the Member States to take action to address these sectors more promptly. The next part of the chapter evaluates in more depth some of these areas that are undermined by corruption and why the EU Commission should pay additional focus in the next EU Anti-Corruption Report. From a reflexive governance theory perspective, this is an example of the reflexive governance component: proceduralism. In this example, it can be argued that the impact has a reflective governance approach, because the EU Anti-Corruption Report suggests that corruption is associated to other areas and Member States have acknowledged the effect that corruption has on other sectors, as well as to their policy shortcomings as highlighted above. In other words, Member States reflect on their own anti-corruption policy shortcomings. The Report has encouraged Member States, when designing future policy in areas that are recognised as being associated with corruption, should take into account to also include preventative measurements against corruption. Thus, it can be argued from a reflexive governance that the impact here in the EU Anti-Corruption Report embodies a reflexive governance component: proceduralism

Another example where the EU Anti-Corruption Report had an impact was to officially acknowledge an estimation of the economic costs incurred by corruption at the EU level. The Report suggests that corruption possibly amounts to €120 billion per year in the EU. The EU Commissioner for Home Affairs at the time, Cecilia Malmstrom, considered the high level of corruption in Europe as ‘breathtaking’, and the €120bn figure had an impact in starting a debate as to what extent the actual cost of corruption is in the EU.<sup>631</sup> As a result, it encouraged various pieces of research to analyse

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<sup>630</sup> Holland, R (2014), ‘EU Anti-Corruption Report Shows Long Road Ahead’. *Compliance Week. Mar 2014, II(122)*, pp. 10-12

<sup>631</sup> James Fontanella, K (2014, February 3), Corruption in the EU costs business €120bn a year, study finds. *The Financial Times*, Retrieved from:

whether the €120bn figure was accurate. Research by Parliamentary Research Services in the 'Cost of Non Europe Report' on Organised Crime and Corruption suggests that corruption costs the EU between €179bn to €990bn in GDP<sup>632</sup> terms on an annual basis. By contrast, the EU Anti-Corruption Report suggests just €120bn. The EU Home Affairs Commissioner Cecilia Malmstrom, at the time when presented with the EU Anti-Corruption Report, suggests that the true cost of corruption could probably be much higher than the €120bn officially acknowledged by the EU Anti-Corruption Report. This is despite the fact that the estimated cost suggested by 'Cost of Non Europe Report' is different to the EU Anti-Corruption Report, because the Report does not take into account other areas that are indirectly affected by corruption. The 'Cost of Non Europe Report' looks at costs in terms of lost tax revenues and foreign investment as a result of the environment created by corruption in the EU and the Member States.

A study conducted by Mungiu-Pippidi applied a different approach in calculating the costs of corruption in the EU and concluded that the estimate of €120bn in the EU Anti-Corruption Report miscalculates the actual costs of corruption. Mungiu-Pippidi argues that the costs are probably more in the range of €323bn, which is about three times more than the EU Anti-Corruption Report estimation.<sup>633</sup> These estimations have led to other pieces of research to pay much closer attention to the cost of corruption not only in economic terms, but also the social and political costs that corruption has in the EU, which the EU Anti-Corruption Report fails to address. From a reflexive governance theory perspective, this is a clear example of the reflexive governance component: active participation.

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<http://www.ft.com/cms/s/0/28f11862-8cf9-11e3-ad57-00144feab7de.html#axzz46ZcUiQmi>

<sup>632</sup> Van Ballegooij, W. and T. Zandstra (2016), Organised Crime and Corruption: Cost of Non-Europe Report, Annex II – Corruption. European Parliament, EPRS | European Parliamentary Research Service, PE 579.319 - March 2016, pp. 26 – 48. Retrieved from: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS\\_STU\(2016\)579319\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS_STU(2016)579319_EN.pdf)

<sup>633</sup> Mungiu Pippidi, A. (2016), 'The good, the bad and the ugly: controlling corruption in the European Union.' *Hertie School of Governance Work Package: WP3, Corruption and governance improvement in global and continental perspectives*, pp. 11 – 30.

In this example, it can be argued that the impact has a reflective governance approach component of active participation, because the EU Anti-Corruption Report officially suggests that corruption possibly amounts to €120 billion per year in the EU, which has led to various pieces of research and ongoing discussions for evaluating the actual cost of corruption in the EU. This has also led people to observe how the EU Commission came up with the €120 billion figure and what areas it covered to estimate that cost. This actively involved different participants from civil society to contribute to the debate by providing research, such as by the Parliamentary Research Services in the 'Cost of Non Europe Report' on Organised Crime and Corruption, and the work of Mungiu-Pippidi to challenge the Commission's figure. As a result, this led to active participation of wider participants that go beyond the EU Commission and Member States. Therefore, the impact in this respect has a reflexive governance approach element to it.

Furthermore, the EU Anti-Corruption Report had an impact in supporting a dialogue between the EU Commission, Member States and civil society to further prioritise anti-corruption policy. Furthermore, it had an impact through preventative anti-corruption measurements in other policy areas that can contribute to tackling corruption. From a reflexive governance theory perspective, this is an example of the reflexive governance component: regulation of self-regulation. Here, in this example, it can be argued that the impact has a reflexive governance approach, because the EU Anti-Corruption policy is encouraging on creating a dialogue between the EU Commission, Member States and civil society to further prioritise their anti-corruption policy. Thus, the EU Anti-Corruption Report is engaging in a regulation of self-regulation process.

Another example where the EU Anti-Corruption Report had an impact was in establishing an anti-corruption experience-sharing programme. The experience-sharing programme is a positive product by the EU Anti-Corruption Report. It can be argued that the establishment of the anti-corruption experience-sharing programme would serve well as a platform for interested parties and stakeholders to engage in a dialogue on how to

best address challenges identified in the EU Anti-Corruption Report, as well as to improve laws and policies by learning from each other's experiences in tackling the issue of corruption more effectively.<sup>634</sup> Since the publication of the EU Anti-Corruption Report there have been four similar events, in a format of a workshop organised in the framework of the programme of peer learning under the EU Anti-Corruption Report initiatives, covering areas such as asset declaration, whistleblowing and healthcare corruption.<sup>635</sup> From a reflexive governance perspective in analysing this example, it can be argued that this impact has a component of the theory of reflexive governance: collective learning. The EU Commission, through the EU Anti-Corruption Report, is supporting Member States to engage in collective and mutual learning exercises. The EU Anti-Corruption Report provides a platform for learning between Member States to learn from each other's best practice and enhance their anti-corruption policy. Furthermore, in this example, the impact of the EU Anti-Corruption Report from a reflexive governance theory point of view, can be seen that the Report is a form of reflexive governance where participants that are actively engaging in enhancing their anti-corruption policy shortcomings and engaging in local experimentations as well. Thereby, this is a clear example of the impact the EU Anti-Corruption Report had in engaging in a process of learning, which is a key component of the theory of reflexive governance as stipulated in more detail in chapter 3.

However, the impacts of the EU Anti-Corruption Report thus far have not embodied all of the seven key components of the theory of reflexive governance. This is in contrast to Chapter 3 when analysing the EU Anti-Corruption Report from a reflexive governance perspective, in which all of

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<sup>634</sup> Rose-Ackerman, S. and P. Carrington (2013), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* North Carolina: Carolina Academic Press, pp. 3 – 35.

<sup>635</sup> European Commission (2016), The Experience Sharing Programme to support Member States, local NGOs and other stakeholders in addressing specific challenges identified in the EU Anti-Corruption Report. Retrieved from: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/experience-sharing-programme/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/experience-sharing-programme/index_en.htm)

the seven key components of the theory of reflexive governance are apparent. The next section analyses the limitations of the EU Anti-Corruption Report and offers suggestions as to why the Report could strengthen further the reflexive governance components. Furthermore, the following section offers some insights and research on areas that future EU Anti-Corruption Reports could also include to establish a more comprehensive anti-corruption policy at the EU and at Member State level.

In evaluating the impact of the EU Anti-Corruption Report effectively, it would be ideal to compare it with the second EU Anti-Corruption Report. However, the second EU Anti-Corruption Report is in progress and is anticipated to come out in autumn 2016. The second EU Anti-Corruption Report is expected to be more indicator-driven and there will be a reflection on the progress made between the first EU Anti-Corruption Report and the second Report. This will offer some more concrete comparisons on the impact that the first EU Anti-Corruption Report had in the Member States. Since there is not a follow-up assessment of the extent to which Member States have taken action on the recommendations made by the EU Anti-Corruption Report, some follow-up on progress is highly anticipated in the next Report. Nevertheless, the research can provide an insight and analysis of some of the elements where the EU Anti-Corruption Report had impact in laying some foundation for developing an anti-corruption policy field in the Member States.

For the EU Anti-Corruption Report to have a solid impact, it would take some time for the Report to first gain enough visibility because it is a relatively new instrument and is a new development at supranational level.<sup>636</sup> From a reflexive governance perspective overall, the EU Anti-Corruption Report is designed in a form of self-regulation and embodies key characteristics of the theory of reflexive governance. The general purpose of the EU Anti-Corruption Report is to engage Member States in regulation of self-regulation processes in order to improve further their anti-

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<sup>636</sup> Krambia-Kapardis, M (2014), 'Perception of political corruption as a function of legislation,' *Journal of Financial Crime*, 21(1), pp. 44 – 55.

corruption measurements and anti-bribery legislations, which are often poorly enforced according to the EU Anti-Corruption Report. Thus, in analysing the general purpose of EU Anti-Corruption Report, it can be argued that the central impacts of the Report have the characteristic forms of regulation of self-regulation.

### **5.3 General limitations of the EU Anti-Corruption Report**

The EU Anti-Corruption Report includes little new data, because the Report draws heavily on work conducted by UN, GRECO, OECD, Transparency International and other regional organisations that are specialists in anti-corruption issues. The Report includes some original data collection - in particular the survey conducted, but it still faces a challenge in demonstrating its added value and usefulness to the public and policymakers. This is because the EU Anti-Corruption Report risks a duplication of the information and data by other international organisations that have a longer history in anti-corruption work. The biggest contribution that the EU Anti-Corruption Report has made is to raise awareness of the sectors that are more affected by corruption and the policy and strategy shortcomings in dealing with corruption in the Member States. In particular, putting anti-corruption policy high on the agenda and creating opportunities for exchanging ideas and policy integration in different areas to address corruption also as law and policy issues. Even if the EU Commission is criticised for collecting existing evidence, rather than conducting new analysis about corruption, the EU Anti-Corruption Report acts as an important reference for understanding the lack of policy and supporting Member States for developing key tools and policies to prevent corruption. This is as well as engaging the EU Commission, Member States and civil society in ongoing dialogue to enhance further their anti-corruption efforts.<sup>637</sup>

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<sup>637</sup> Van Ballegooij, W. and T. Zandstra (2016), Organised Crime and Corruption: Cost of Non-Europe Report, Annex II – Corruption. European Parliament, EPRS | European Parliamentary Research Service, PE 579.319, pp. 72 – 88.



There is no formal assessment procedure in the current EU Anti-Corruption Report, for instance similar to the GRECO's evaluation.<sup>638</sup> Some follow-up on country-specific recommendations is envisaged in the second EU Anti-Corruption Report. However, no formal assessment procedures have been established within the framework of the EU Anti-Corruption Report up to this point. Other limitations are the areas covered by the recommendations in the EU Anti-Corruption Report. Transparency International evaluations of the EU Anti-Corruption Report point out the lack of specific recommendations in the Report - in particular, on the protection of whistleblowers, access to information and lobbying. In fact, communication from the EU Commission in 2011 on the EU Anti-Corruption Report mentioned that these areas would be evaluated in depth when the Report is issued in February 2014. Furthermore, Transparency International, in its evaluation, observed the lack of attention to the cross-border element in the EU Anti-Corruption Report - particularly where the EU dimension is mostly needed.<sup>639</sup>

There were other areas and sectors that the first communication by the EU Commission for establishing the EU Anti-Corruption Report in 2011 promised - for example, an evaluation of law enforcement, judicial and police cooperation within the EU. The first communication by the EU Commission for establishing the EU Anti-Corruption Report also promised that the EU Anti-Corruption Report would also cover asset recovery, accounting standards, statutory audit for EU companies, enhancing the integrity in sport and match fixing. Furthermore, the first communication by the EU Commission for establishing the EU Anti-Corruption Report in 2011 also suggested that the EU Anti-Corruption Report would provide an evaluation of the EU's external policies in regards to the EU Candidate States, potential candidates and neighbouring countries to make recommendations on policy reforms in addressing their anti-corruption

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<sup>638</sup> Schmidt-Pfister, D and H. Moroff (2013) *Fighting Corruption in Eastern Europe: A Multilevel Perspective*, New York: Routledge, pp. 78-85

<sup>639</sup> Dolan, C. (2014, February 3), We have an anti-corruption report: So now what?', *Transparency International EU*. Retrieved from: <http://www.transparencyinternational.eu/2014/02/we-have-an-eu-anti-corruption-report-sonow-what/>

policy shortcomings.<sup>640</sup> The first EU Anti-Corruption Report issued in February 2014 did not pay any attention to any of these areas mentioned above, which in the first communication by the Commission in 2011, when it launched the idea of establishing EU Anti-Corruption Report, suggested that they would be an integral part of the EU Anti-Corruption Report when the Report would be published.

Furthermore, in the first communication by the EU Commission for establishing the EU Anti-Corruption Report in 2011, it was suggested the EU Anti-Corruption Report would also evaluate the level of corruption within the EU institutions and offer some suggestions for policy reforms for the EU institutions.<sup>641</sup> Research finds that the DG Home Affairs dropped such an idea for assessing corruption within the EU institutions, because the Commission perceived it to be biased in its approach to evaluate its own EU institutions. Therefore, it is anticipated that the EU Commission might commission someone out of the EU institutions to make an evaluation and analysis of the level of corruption within the EU institutions in the future.

As a result, the evaluation of corruption within the EU institutions does not fall within the scope of the EU Anti-Corruption Report. From the perspective of the EU and its report, monitoring and evaluation procedures with regards to corruption at the EU level and within its institutions are weaker than their counterparts relating to the state of corruption in the Member States. In order to offer some kind of evaluation and to remedy this gap, Transparency International made a study of corruption and integrity risks in the EU institutions and pertaining to the EU's budget in its 2014 EU Integrity System Report.<sup>642</sup> The report by Transparency International contains an evaluation of ten EU institutions and agencies. Those are the European Parliament, European Council, Council of the EU, European Commission, Court of Justice of the European Union, European Court of

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<sup>640</sup> European Commission (2011), Communication Fighting Corruption in the EU. COM (2011) 308 final.

<sup>641</sup> European Commission (2011), Communication Fighting Corruption in the EU. COM (2011) 308 final.

<sup>642</sup> Transparency International (2014), Report on the EU Integrity System. Retrieved from: <http://www.transparencyinternational.eu/focus-areas/eu-integrity/>

Auditors, European Anti-Fraud Office, Europol and Eurojust, and Ombudsman.<sup>643</sup> So far, this report by Transparency International represents a comprehensive and independent study on the state of corruption at the EU level.<sup>644</sup> However, the EU institutions are subject to external review through their membership in UNCAC. Even so, such a review has not been concluded to this point and it is difficult to make a concrete evaluation. Should the EU and its institutions accede to GRECO, it would face similar scrutiny and it can be evaluated more clearly. The next section will evaluate some key areas that the next EU Anti-Corruption Report could strongly take into consideration to cover and raise more awareness of the policy shortcomings in future EU Anti-Corruption Reports.

#### **5.4 General improvements for future EU Anti-Corruption Reports**

As observed in Chapter 2 and in the section above, the EU Anti-Corruption Report cannot meet alone all the challenges posed by corruption. In the Member States, the level of corruption constitutes an obstacle to the current anti-corruption policy and framework in place according to the EU Anti-Corruption Report. Thus, combating corruption must be an ongoing priority for the Member States and the EU. There are several ways in which the EU Anti-Corruption Report can address some of the current anti-corruption policy shortcomings and support Member States to develop their own comprehensive anti-corruption policy fields. Furthermore, future EU Anti-Corruption Reports could build upon the current framework in adopting more the reflexive governance approach to anti-corruption policy initiatives.

The first general suggestion is that future EU Anti-Corruption Reports could also include the EU institutions within the scope of the Report, as was originally planned for the EU Anti-Corruption Report that the EU

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<sup>643</sup> Transparency International (2014), Report on the EU Integrity System. Retrieved from: <http://www.transparencyinternational.eu/focus-areas/eu-integrity/>

<sup>644</sup> Van Ballegooij, W. and T. Zandstra (2016), Organised Crime and Corruption: Cost of Non-Europe Report, Annex II – Corruption. European Parliament, EPRS | European Parliamentary Research Service, PE 579.319, pp. 104 – 110.

Commission proposed in its communication in 2011. The Commission could use another agency outside its own structure to prevent bias. Furthermore, including the EU institutions within the scope of the Report would give more credibility to the EU Anti-Corruption Report by showing that the EU is evaluating its own intuitions and keeping its own house in order. Thus, by also including the EU institutions within the scope of the EU Anti-Corruption Report, it would contribute in making the EU Anti-Corruption Report a more comprehensive anti-corruption monitoring instrument and also strengthen the reflexive governance approach component: regulation of self-regulation. The EU Commission, by also including its own EU institutions within the scope of the EU Anti-Corruption Report, would strengthen the reflexive governance approach component of regulation of self-regulation, because the EU institutions will have an opportunity under the EU Anti-Corruption Report to engage in regulation of self-regulation processes. Such a reflexive approach will be a positive contribution by the EU Anti-Corruption Report to also identify the shortcomings of EU institutions to addressing corruption within their own departments and institutions. This reflexive approach will also give the EU Anti-Corruption Report adequate credibility to promote positive anti-corruption initiatives.

Another general suggestion could be made that the EU Commission can involve the EU Member States at a much earlier stage in the process of developing the EU Anti-Corruption Report in future Reports. In the EU Anti-Corruption Report issued in 2014, the DG Home Affairs suggested that the EU Member States were involved at a later stage in the process and the findings of the Report were sent to Member States for correction six months prior to the publication of the Report. Another national suggestion from the UK Home Office endorsed such an approach for future EU Anti-Corruption Reports for Member States to be involved at an earlier stage in the future Reports. However, what the Commission and the UK Home Office could have also suggested is for a greater involvement of civil society and private sector representatives at earlier stages of preparing future EU Anti-Corruption Reports, rather than consulting different

stakeholders for the Report. Involving a wider range of actors at an earlier stage would also be helpful in publishing a coherent and much more focused Anti-Corruption Report. Thus, it will also avoid any possible delays such as the first EU Anti-Corruption Report, which was suggested for issuing in the summer of 2013 and was finally published in February 2014. Also, the next EU Anti-Corruption Report was predicted to be published in February 2016 and at it looks likely to be published sometime in autumn 2016. Furthermore, involving the EU Member States, including a wider participation of civil society and private sector representatives at a much earlier stage in preparing the EU Anti-Corruption Report would also strengthen a reflexive governance approach component: active participation. The increase in wider participation at an earlier stage in future Reports would strengthen the reflexive governance approach, because it will enable wider participation in shaping a more coherent anti-corruption policy. Furthermore, it will empower the participation of local actors to be involved in the process of preparing the EU Anti-Corruption Report and thus strengthening the reflexive governance approach.

The final general suggestions for the future EU Anti-Corruption Reports would be to increase the number of outputs and add more new data to the Report. It may be useful for the EU Commission to consider making information available between biennial publications of the EU Anti-Corruption Report by sharing all of the monitoring data collected. Such a change would have a positive impact in enabling ongoing discussions and sharing best practices. The experience of the CVM showed that the internal publication was useful in keeping the anti-corruption policy discussion high on the agenda and keeping a track record on meeting the anti-corruption policy goals. The current EU Anti-Corruption Report has not included much new data, but rather used secondary data conducted by other international organisations. To add new data, especially for the EU Anti-Corruption Report, would raise more the profile of the EU Anti-Corruption Report; because of the new findings, the Report would have more importance as an anti-corruption monitoring instrument. Such an approach would also strengthen more the reflexive governance approach of collective

learning. Future EU Anti-Corruption Reports, by providing new data and also issuing internal reports in between the EU Anti-Corruption Reports, would strengthen the reflexive governance approach of collective learning by further supporting mutual learning between different levels of governance and making the Report more reflexive in its substance. Such a reflexive approach would be beneficial to the Member States, because they will be able to further engage in a dialogue and mutual learning experience-sharing programme. Thus, the EU Anti-Corruption Report, by using reflexive governance approach, can support Member States to keep high the agenda against fighting corruption and develop a comprehensive anti-corruption policy.

The following section will make some concrete suggestions in areas and policy sectors that, throughout the research, were observed to be vitally important for the EU Anti-Corruption Report to be a successful monitoring instrument. Furthermore, the following section will address some key areas that can help the EU Commission through the EU Anti-Corruption Report to support Member States in developing a comprehensive anti-corruption policy at Member State and local level, as well as to strengthen more the reflexive governance components that were laid out in Chapter 3.

## **5.5 Protection of Whistleblowers**

Throughout the different chapters, there is a pattern on how corruption affects people differently and how different sectors are seriously threatened by corrupt practices. The research throughout the chapters has offered different examples on how corruption weakens the very fabric of democracy, economy, society, the political system, and the judiciary.<sup>645</sup> As a result, the legal and political forms of corruption have become part of the larger debate in the EU and the Member States. Furthermore, the different chapters have shown some of the key gaps in the systems across Europe and exposed the inadequate regulation and policies to address corruption

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<sup>645</sup> Mungiu-Pippidi, A (2015), *The Quest for Good Governance: How Societies Develop Control of Corruption*. Cambridge Cambridge: University Press, pp. 1-26

promptly. As a result, the EU Commission in the EU Anti-Corruption Report estimates the total financial cost of corruption to be as high as €120 billion per year and thus, having an adverse impact in all of the Member States public resources.<sup>646</sup> Therefore, it can be argued that no country is immune to corruption and meets challenges for policy success in addressing the high cost of corruption.

As the research has shown, corruption typically happens behind closed doors and away from the public eye. Whistleblowers reporting corruption have it far from easy and straightforward to report on corruption cases. In the EU, nearly 74 percent of those who have witnessed or experienced corruption did not report it. Despite the willingness of individuals to report corruption, this number of actual reports of corruption is extremely low.<sup>647</sup> This indicates that nearly 74 percent in the EU are reluctant to blow the whistle against corruption according to a survey conducted by Transparency International. Although progress has been made in preventing corruption in the EU, the laws and regulations - as the research has demonstrated throughout the different chapters - remain far from adequate and sufficient.<sup>648</sup> This is because there are particular gaps when it comes to whistleblower protection legislation, where citizens can feel safe to question practices that have some form of corruption involved.

Whistleblowers are crucial in exposing corrupt practices. However, despite being widely acknowledged as a key source to disclose corruption and other misconduct associated with corrupt practices, whistleblowers are regularly the ones who pay the price because of the lack of legal protection. The research in the EU finds that there are inadequate laws in place when it comes to whistleblower protection legislation. A recent study by Transparency International on whistleblower protection found that only 4

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<sup>646</sup> Auby, .B.J, and E. Breen (2014), *Corruption and conflicts of interest: a comparative law approach*. Cheltenham: Edward Elgar, pp. 3-15.

<sup>647</sup> Schultz, D and K, Harutyunyan (2015), 'Combating corruption: The development of whistleblowing laws in the United States, Europe, and Armenia'. *International Comparative Jurisprudence*, 1(2), pp. 87-97

<sup>648</sup> Transparency International Corruption Perception Index (2014), Retrieved from: [www.transparency.org/cpi2014/infographic/regional/european-union-and-westerneurope](http://www.transparency.org/cpi2014/infographic/regional/european-union-and-westerneurope)

out of 28 EU Member States have legal frameworks for whistleblower protection that are considered to be acceptable. The other Member States have partial, poor or no legal framework at all in place for whistleblower protection.<sup>649</sup>

Therefore, it can be argued that, in future, EU Anti-Corruption Reports in their thematic chapter could pay particular attention in evaluating the level of legal whistleblower protection in all of the Member States and make sound recommendations on implementing adequate legal protections for whistleblowers. The EU Commission, in the next and future EU Anti-Corruption Reports, could engage in providing a thorough evaluation of the current legal frameworks for whistleblower protection in all of the Member States. The Commission can seek in the next Report to enable a process of strengthening the protection of whistleblowers and, through a reflexive governance approach, engage Member States in a mutual learning process to see what is the legal framework in place. Furthermore, such a reflexive governance approach would ensure that all of the Member States would engage in a dialogue with the EU Commission through the EU Anti-Corruption Report to develop more adequate legal protection for whistleblowers. Furthermore, by evaluating the legal framework for the protection of whistleblowers through the EU Anti-Corruption Report, the EU Commission will also strengthen the reflexive governance component: regulation of self-regulation. Member States will have a chance to self-regulate their own legislation concerning whistleblowers, by reflecting on the legal shortcomings that are in place in many of the Member States. The following section demonstrates in more depth the lack of legal protection for whistleblowers in many Member States, and why it is very imperative for the future EU Anti-Corruption Reports to make whistleblower protection as part of their thematic chapter.

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<sup>649</sup> Transparency International (2014), Report on Whistleblowing in Europe Legal protections for Whistleblowing in the EU. Retrieved from: [https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU\\_Whistleblower\\_Report\\_final\\_web.pdf](https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU_Whistleblower_Report_final_web.pdf)



## 5.6 The legal background of whistleblowers in the EU Member States

In the European Union, Sweden is known by researchers to be the first country to pass legislation that is known as the Freedom of Information Law in 1766, which is also considered to be one of the first legal frameworks for whistleblower protection in the world.<sup>650</sup> Sweden's Freedom of the Press Act 1766 formed the basis for a legal framework that represents de facto protections for those who expose wrongdoing even to this day.<sup>651</sup> Sweden does not have a separate whistleblower law so far, and only in 2016 a new whistleblower protection law was proposed.

The first far-reaching whistleblower law ever passed in the EU is the UK Public Interest Disclosure Act (PIDA) and is widely considered by research to be among the best practice in the EU.<sup>652</sup> In light of a succession of many high-profile political and business scandals, the UK in 1998 responded by passing the PIDA. Nearly all employees in the government, private and non-profit sectors are covered by the PIDA. The whistleblower law under the PIDA goes so far as to legally protect contractors, trainees and UK workers based overseas. Therefore, the PIDA is considered as one of the best practice models for whistleblower protection law across the EU.<sup>653</sup>

The UK law under the PIDA requires employers to show that any action taken against an employee or worker was not driven by the fact that an employee was a whistleblower. According to research, this reverse burden-of-proof has become an international standard. France is considering implementing a similar reverse burden-of-proof standard as the UK. Under PIDA, in addition to any financial losses, employees who have been responded against can also claim payment for damages and injury to their

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<sup>650</sup> Ackerman, J. and I. S. Ballesteros, (2006), 'The Global Explosion of Freedom of Information Laws', *Administrative Law Review*, **58**(1), pp. 85 – 130.

<sup>651</sup> Mendelsohn, M (2016), *The Anti-Bribery and Anti-Corruption Review*, - Edition 4, London: Law Business Research, pp. 259 – 271.

<sup>652</sup> Lewis, D (2008), 'Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected?', *Journal of Business Ethics*, **82**(2), pp. 497 – 507.

<sup>653</sup> Lewis, D (2008), 'Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected?', *Journal of Business Ethics*, **82**(2), pp. 497 – 507.

personal feelings.<sup>654</sup> However, in the UK, the whistleblower campaigners suggest further improvement of the PIDA. This is despite the fact that the PIDA is often held as a model and has inspired whistleblower proposals and laws in many other countries, even those outside of the EU, such as Australia, Japan and South Korea.<sup>655</sup>

After the UK passed the PIDA, some of the EU Member States paid more attention towards protecting whistleblowers and they started to also ratify their own whistleblowers' protections laws. Early 2000 marked the first wave of ratifying new whistleblowers' legislation in many of the EU Member States. The Netherlands ratified its protections for public servants in 2001 and established in 2006 a public sector ethics and integrity agency.<sup>656</sup> Malta ratified its whistleblower regulations around 2007; later in 2009, Malta introduced a ban on retaliation against public officers who report wrongdoing and corrupt acts.<sup>657</sup> The first country in Central Europe in 2004 to ratify a dedicated law to protect whistleblowers from retaliation was Romania. The Whistleblower Protection Act covers government employees and it gives equal protection to disclosures made to journalists, activists and other parties outside the workplace in Romania.<sup>658</sup> In other words, the whistleblowers legislation in Romania can bypass their employers without being punished. After Romania in 2004, Belgium ratified a law to protect public sector whistleblowers.<sup>659</sup>

In 2010, following a gap of several years, Hungary implemented a similar whistleblowers protection law as the UK PIDA. Hungary and the UK are

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<sup>654</sup> Lewis, D (2015), 'Is a public interest test for workplace whistleblowing in society's interest?', *International Journal of Law and Management*, 57(2), pp. 141-158.

<sup>655</sup> Yeoh, P (2014), 'Whistleblowing: motivations, corporate self-regulation, and the law', *International Journal of Law and Management*, 56(6), pp. 459-474.

<sup>656</sup> Savage, A (2016), *Leaks, Whistleblowing and the Public Interest: The Law of Unauthorised Disclosures*. Cheltenham: Edward Elgar, pp. 105-106.

<sup>657</sup> Thüsing, G. and G. Forst (2016), *Whistleblowing - A Comparative Study. Ius Comparatum - Global Studies in Comparative Law*. Springer: Springer Publisher International Publishing AG, pp. 187 – 202.

<sup>658</sup> Ogarcă, R (2009), 'Whistleblowing in Romania'. *Young Economists Journal, Special Issue, Vol. 7*, pp.105-114

<sup>659</sup> Global Guide to Whistleblowing Programs (2012), World Law Group, pp. 11-16, Retrieved from:

[http://media.lockelord.com/files/upload/WLG Global Guide to Whistleblowing Programs-2012.pdf](http://media.lockelord.com/files/upload/WLG%20Global%20Guide%20to%20Whistleblowing%20Programs-2012.pdf)

the only two countries in the EU to have stand-alone legislation that covers both the public and private sectors. However, Hungary did not set up a government agency where whistleblowers can make their disclosures and file complaints of retaliation, despite implementing a whistleblowers' protection law similar to the UK model.<sup>660</sup> In 2010, Slovenia passed anti-corruption legislation that includes legal protections for public and private sector employees. However, Slovenia did not ratify a dedicated whistleblower protection law. The measurements under the anti-corruption legislation in Slovenia contained many best practices to protect whistleblowers.<sup>661</sup> In 2010, Ireland amended the Prevention of Corruption Act to provide some safeguards for people reporting corruption and put in place a Criminal Justice Act in 2011 to strengthen the protection of whistleblowers.<sup>662</sup>

In 2011, Luxembourg approved an anti-corruption law, which also included some legal protections for public and private sector employees who report on corruption and abuse of office inspired by the UK model.<sup>663</sup> Interestingly, Luxembourg also placed the burden-of-proof on employers, and similar to the UK PIDA legislation, it allows employees to file appeals to an employment tribunal. In 2012, Austria introduced for the first time legal protections for government employees for those in case they blow the whistle. Therefore, those who act against whistleblowers are subject to disciplinary proceedings in Austria.<sup>664</sup>

Italy in 2012 implemented its first provision to legally protect whistleblowers in the public sector. The legislation covers government

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<sup>660</sup> Lewis, D (2013), *A Global Approach to Public Interest Disclosure: What Can We Learn from existing whistleblowing legislation and research?*, Cheltenham: Edward Elgar, pp. 28-33.

<sup>661</sup> Semenova, E. and M. Edinger (2014), *Parliamentary Elites in Central and Eastern Europe: Recruitment and representation*. London and New York: Routledge, pp. 284-308.

<sup>662</sup> Deming, H. S (2012), *Anti-Bribery Laws in Common Law Jurisdictions*. New York: Oxford University Press, pp. 68-70

<sup>663</sup> Schultz, D. and K. Harutyunyan (2015), 'Combating corruption: The development of whistleblowing laws in the United States, Europe, and Armenia', *International Comparative Jurisprudence*, 1(2), pp. 87-97.

<sup>664</sup> Knyrim, R and G. Trieb (2011), 'Whistleblowing hotlines in Austria'. *International Data Privacy Law*, 1(1), pp. 70-75.

employees who report wrongdoing activities if they do not commit defamation.<sup>665</sup> The provision was drafted with input from Transparency International Italia.<sup>666</sup> In 2013, France passed a law to protect whistleblowers that reveal only environmental and health risks. Introduction of such a law followed from a series of extensive reports of public health activates related to a diabetes drug, the overconsumption of salt and a hazardous industrial solvent.<sup>667</sup>

The above examples clarified in more depth the argument as to why EU countries have made less or no progress in legally protecting whistleblowers, except for Luxembourg, Romania, Slovenia and the UK. For instance, Denmark has no designated whistleblower law, no dedicated agency to advise and protect whistleblowers.<sup>668</sup> Denmark is also the only Nordic country with no clear regulations on whistleblowers. Portugal is also another example where there is almost no legal protection under the law for whistleblowers. Furthermore, in Portugal, whistleblowers can be criminally prosecuted or face civil lawsuits for defaming others, especially those in positions of power.<sup>669</sup>

Therefore, the EU Commission in future EU Anti-Corruption Reports could strongly consider to make the thematic chapter on protection of whistleblowers. Furthermore, the future EU Anti-Corruption Report could shift its focus from public procurement in support of a comprehensive legal protection of whistleblowing and open a debate to introduce meaningful

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<sup>665</sup> Thüsing, G. and G. Forst (2016), *Whistleblowing - A Comparative Study. Ius Comparatum - Global Studies in Comparative Law*. London: Springer Publisher International Publishing AG, pp. 7-15.

<sup>666</sup> Transparency International (2014), Report on Whistleblowing in Europe Legal protections for Whistleblowing in the EU. Retrieved from: [https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU\\_Whistleblower\\_Report\\_final\\_web.pdf](https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU_Whistleblower_Report_final_web.pdf)

<sup>667</sup> Etienne, J (2015), 'Different ways of blowing the whistle: Explaining variations in decentralized enforcement in the UK and France', *Regulation and Governance*, 9(4), pp. 309-324

<sup>668</sup> Brown, A. Lewis, D. Moberly, R. and W. Vandekerckhove (2014), *International Handbook on Whistleblowing Research*. Cheltenham: Edward Elgar, UK. pp. 104 -108.

<sup>669</sup> Transparency International (2014), Report on Whistleblowing in Europe Legal protections for Whistleblowing in the EU. Retrieved from: [https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU\\_Whistleblower\\_Report\\_final\\_web.pdf](https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU_Whistleblower_Report_final_web.pdf)

legal protection for whistleblowers in the foreseeable future in the Member States. As the example of different EU states showed in the research above, there is some important progress in many EU countries, but only a few whistleblower laws provide sufficient legal protections for whistleblowers.

There is some strong opposition to the protection of whistleblowers and there is a negative perception of whistleblowers in many EU countries, which has made it difficult to pass meaningful whistleblower laws. However, the EU Anti-Corruption Report has the capacity to launch a debate to implementing meaningful laws for the protection of whistleblowers. Thus, future EU Anti-Corruption Reports could dedicate the next thematic chapter on supporting Member States to enhance and improve their legislation on the protection of whistleblowers.

If future EU Anti-Corruption Reports make the protection of whistleblowers as a thematic chapter of the Report, the EU Commission will also further strengthen the reflexive governance approach in the design of the EU Anti-Corruption Report. The inclusion of the protection of whistleblowers as a thematic chapter of the Report will have an impact in strengthening several components of the theory of reflexive governance as outlined in Chapter 3.

Firstly, the EU Anti-Corruption Report, by making the protection of whistleblowers as a thematic chapter, will strengthen the collective learning element of reflexive governance approaches. The Report will enable a dialogue and mutual learning process between different actors at EU and Member State level to engage in a learning process about the best legal practices for protecting whistleblowers in the Member States. Furthermore, it will allow for different actors to engage in mutual learning and thus the EU Anti-Corruption Report would strengthen the reflexive governance component of collective learning further. Secondly, the EU Anti-Corruption Report, by making the protection of whistleblowers as a thematic chapter, will strengthen the reflexive governance component: active participation. The inclusion of protecting whistleblowers in the EU Anti-Corruption

Report through a reflexive governance approach will further encourage further a wider participation of governance at domestic, regional, and local level to engage in a process of enhancing the protection of whistleblowers. Thus, the reflexive governance component of active participation would be strengthened further if the future EU Anti-Corruption Reports include the legal protection of whistleblowers as a thematic chapter, because different levels of governance and of civil society would engage in shaping better policymaking for protecting whistleblowers. Thirdly, the theory of reflexive governance component of proceduralism would strengthen further in future EU Anti-Corruption Reports if the protection of whistleblowers were included. The Report will make Member States take part in the process of certain actors in improving the protection of whistleblowers. Furthermore, the EU Anti-Corruption Report would support Member States through a reflexive design of the Report to ensure that various levels of governments would make part of their procedure the protection of whistleblowers. Fourthly, the EU Anti-Corruption Report, by drawing guidelines for the Member States in the Report, would also strengthen another key aspect of the theory of reflexive governance: soft law. The Commission, by providing guidelines for the Member States on how to implement coherent legislation, for the protection of whistleblowers, would also strengthen soft law, which is another key component of the theory of reflexive governance. Fifthly and more importantly, the EU Anti-Corruption Report, by including an evaluation of the legal protection of whistleblowers in the Member States, in the thematic chapter would strengthen another important component of the theory of reflexive governance: regulation of self-regulation. The EU Anti-Corruption Report, by assessing the level of legal protection of whistleblowers of the Member States, would ultimately come up with shortcomings as the research suggests above; thus, it will support Member States to engage in a regulation of self-regulation process. Thus, the EU Anti-Corruption Report would strengthen further the regulation of self-regulation element of the Report and support Member States to be reflexive on their own legal shortcomings in sufficiently protecting whistleblowers. From a reflexive governance perspective as stipulated in Chapter 3, the EU Commission would invite Member States to reflect on their own legal

shortcomings to protect whistleblowers and engage them into a regulation of self-regulation process. As a result, the EU Anti-Corruption Report would further strengthen a crucial aspect of the theory of reflexive governance. The following section covers some other insights on another important area that future EU Anti-Corruption Reports could address.

### **5.7 Empowering Specialised Anti-Corruption Institutions at Member State level**

The EU Anti-Corruption Report suggested that all of the EU Member States should consider examining their own anti-corruption policy shortcomings and come up with their own national anti-corruption action plans. The research throughout the different chapters above has indicated that it is crucial that there is an institutional infrastructure in place to fight corruption and implement national anti-corruption action plans more effectively. In the EU Anti-Corruption Report, especially in the country chapter recommendations, there is an extensive list of reasons that lead to thinking that the establishment of an anti-corruption agency is vitally important to implement key anti-corruption policy objectives. Furthermore, the EU Anti-Corruption Report in country chapter recommendations makes a strong case for Member States to strengthen their anti-corruption agencies and institutions, especially in many post-communist countries. The Commission, also in the EU Anti-Corruption Report, indicated it is crucial for Member States how to accept all changes in word and deed to make their anti-corruption agencies more independent from political influences and increase their capacities to implement national anti-corruption policies and strategies.

In analysing the recommendations for each of the Member States, there is a clear indication that many Member States lack or have any proper institutional infrastructure in place to fight corruption and implement national anti-corruption strategies effectively. Thus, in the next EU Anti-Corruption Report, it would be highly encouraging for the EU Commission to also include an in depth analysis of the anti-corruption agencies in the

Member States and offer an evaluation of how effective these anti-corruption agencies are in combating corruption. Furthermore, the EU Commission could engage Member States to further improve their anti-corruption agencies by showing them best practice examples from other successful anti-corruption agencies. Also, the EU Commission in the next EU Anti-Corruption Report can ensure that all Member States have their anti-corruption agencies in line with international anti-corruption standards.

The next EU Anti-Corruption Report could first recommend that all Member States should adopt common principles and standards for anti-corruption agencies based on the Jakarta Statement on Principles for Anti-Corruption Agencies.<sup>670</sup> At the end of 2012, anti-corruption practitioners, experts, international practitioner, and representatives of anti-corruption bodies across the world, high representatives of UNDP, UNODC, WB, OECD, as well as Transparency International, came up with sixteen principles to ensure the independence and effectiveness of anti-corruption agencies. These common principles are mainly intended to improve the operations of anti-corruption agencies. The set of such principles known as the Jakarta Statement on Principles for Anti-Corruption Agencies were approved by the International Association of Anti-Corruption Authorities and also by the United Nations Convention Against Corruption (UNCAC) country parties to promote and strengthen the effectiveness of anti-corruption agencies.

The Jakarta Statement is not legally binding, it is a political statement to make countries reflect on their own anti-corruption agencies and be more committed in improving their anti-corruption standards. Furthermore, the Jakarta Statement supports anti-corruption agencies to have a stronger mandate and resources available to anti-corruption agencies in order to perform their duties and fight corruption more effectively. The EU Anti-Corruption Report in the next Report could make a case study in analysing

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<sup>670</sup> UNODC (2012), The Jakarta Statement on Principles of Anti-Corruption Agencies. Retrieved from: [https://www.unodc.org/documents/corruption/WG-Prevention/Art\\_6\\_Preventive\\_anti-corruption\\_bodies/JAKARTA\\_STATEMENT\\_en.pdf](https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf)



and evaluating whether anti-corruption agencies in each of the Member States are fit for purpose. Furthermore, the EU Anti-Corruption Report could offer recommendations by starting on the basis of the sixteen principles set out by the Jakarta Statement on anti-corruption agencies. There are other international frameworks, including the Council of Europe and OECD, which are very similar in setting general standards and principles for operations of anti-corruption agencies as the Jakarta Statement.<sup>671</sup> The next EU Anti-Corruption Report could review if anti-corruption agencies fully meet these international criteria and support Member States to make their anti-corruption agencies come into line with international standards. Some elements are key for anti-corruption agencies to be in place in order to be effective and the EU Anti-Corruption Report could at least focus on those main points. Patrick Meagher and Caryn Volland have identified ten factors that are key for an effective anti-corruption agency. These include their political mandate, legal status cross-agency coordination, prevention and monitoring government implementation of anti-corruption policy, accountability, independence, powers, professional staff and sufficient resources.<sup>672</sup>

The EU Anti-Corruption Report could focus on key factors that can have an influence on anti-corruption agencies performance, such as their independence and legal status, their financial and human resources, their investigation history, their prevention track record, their accountability, cooperation with other Member States and International organisation, as well as their education, outreach projects and the national public perceptions of the anti-corruption agencies' performance.

First and foremost, it is key that anti-corruption agencies are independent and, as Article 6 of UNCAC indicates, that anti-corruption agencies must be provided with the necessary independence to undertake their roles

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<sup>671</sup> Bryane, M (2012), 'Issues in Anti-Corruption Law: How Can Code of Conduct Laws Be Drafted in Order to Reduce Corruption in a Public Sector like Romania', *European Law Journal*, **18**(2), pp. 289–322.

<sup>672</sup> Meagher, P (2005), 'Anti-corruption agencies: Rhetoric versus reality.' *The Journal of Policy Reform*, **8**(1), pp. 69-103.

effectively and free from any undue influence.<sup>673</sup> Meagher and Voland indicated that, in many cases, the incumbent government uses anti-corruption agencies as a weapon against their political opponents.<sup>674</sup> Meagher suggests in his account that anti-corruption agencies are often controlled by incumbent governments, and use it to attack members of the opposition, as well as punishing members of their own party who are perceived as having stepped out of line.<sup>675</sup> Along the same lines, Robert Klitgaard has observed that anti-corruption agencies and anti-corruption campaigns are at times used to fight political opponents rather than to essentially fight corruption.<sup>676</sup> Thus, the EU Anti-Corruption Report could address how independent anti-corruption agencies are in the Member States and at the same time ensure that anti-corruption agencies are not used as a weapon to fight political opponents, but rather fight corruption. Therefore, the benchmark of an independent anti-corruption agency is the most important element, because the anti-corruption agency should have the public respect and credibility that it is actually fighting corruption. The EU Anti-Corruption Report could support in the next Report national anti-corruption agencies at Member State level to have political independence, so that they cannot be controlled or used by the political elite for political purposes.

The EU Anti-Corruption Report, in the recommendations chapter to the Member States, points out in numerous cases that Member States should allocate more resources to their anti-corruption agencies and institutions that deal with corruption related cases. It is vital that anti-corruption agencies have an adequate budget and human resources in place to perform their functions effectively. Thus, the next EU Anti-Corruption Report could

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<sup>673</sup> United Nations Convention against Corruption (2003), Article 6 Preventive anti-corruption body or bodies, p. 10.

<sup>674</sup> Meagher, P and C .Voland (2006), ‘Anti-corruption Agencies (ACA’S): Office of Democracy and Governance Anti-corruption Program Brief’, *IRIS Discussion Papers on Institutions and Development*. The University of Maryland, pp. 8-10.

<sup>675</sup> Meagher, P (2005), ‘Anti-corruption agencies: Rhetoric versus reality’, *The Journal of Policy Reform*, 8(1), pp. 69-103.

<sup>676</sup> OCDE (2014), *Addressing corruption together* by Robert Klitgaard, Paris: OCDE, pp. 41-66, Retrieved from: <https://www.oecd.org/dac/governance-peace/publications/FINAL%20Addressing%20corruption%20together.pdf>

support for more resources to Member States' anti-corruption agencies and encourage more Member States' governments to allocate sufficient funds to their anti-corruption agencies. An adequate budget allocated to anti-corruption agencies is also an important indicator of the government's political will to fighting corruption. Research finds that many anti-corruption agencies in the EU have complained of their limited resources and the uncertainties of their budget allocation for having sufficient financial support to run their operations. While all governments in the EU face budget constraints, Francesca Recanatini notes in her account that the allocation of limited resources for anti-corruption agencies might be an indication of the lack of a genuine commitment to Member States' anti-corruption agencies' mission by their governments.<sup>677</sup> Therefore, the next EU Anti-Corruption Report could support further anti-corruption agencies in obtaining adequate financial means in order to have sufficient resources in place that will assist to fight corruption more effectively.

Furthermore, the next EU Anti-Corruption Report could support Member States by providing training opportunities for the anti-corruption agencies' personnel, which are also vital for enhancing anti-corruption policy success with their level of expertise. A crucial factor for anti-corruption agencies' effectiveness is their ability to have highly skilled personnel and technical capacity in place. Thus, the Commission in the next EU Anti-Corruption Report could support Member States to provide specialised training opportunities to personnel of anti-corruption agencies in order to implement key anti-corruption policy objectives that also have an EU dimension to them.

The next EU Anti-Corruption Report might also support anti-corruption agencies in education and outreach projects. The EU Anti-Corruption Report could support Member States to reflect on their anti-corruption agencies' education and outreach projects, and evaluate how effective the anti-corruption agencies have been in engaging citizens in anti-corruption

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<sup>677</sup> Rose-Ackerman, S (2013), *International Handbook on the Economics of Corruption*.. Cheltenham: Edward Elgar Publishing, Volume Two, pp. 528 – 571.

policy and anti-corruption campaigns.<sup>678</sup> The EU Anti-Corruption Report has the potential to support anti-corruption agencies in the Member States to embark on corruption prevention projects, draw co-ordinated plans for outreach and education projects to prevent corrupt practices, as well as support collaboration between the anti-corruption agencies and other stakeholders in their outreach and education projects. Furthermore, the EU Anti-Corruption Report could also support anti-corruption agencies to promote their outreach project through the EU Commission website as well as on social media, which is a powerful channel currently for sharing information and especially reaching out to the youth demographic. Such an approach would stimulate engagement between anti-corruption agencies and the broader public on corruption prevention projects and initiatives.

On a final note, the EU Anti-Corruption Report could in the next Report promote further cooperation of the anti-corruption agencies with other organisations. In the EU Anti-Corruption Report, it was noted that there is a lack of cooperation between anti-corruption institutions and other stakeholders to address corruption related cases. Meagher in his account finds that the success of anti-corruption agencies depends on cooperation with other organisations, because it drives anti-corruption agencies to achieve their targets and to commit to concrete forms of cooperation to address corruption more effectively.<sup>679</sup> However, Meagher observes that such cooperation is difficult to achieve in reality, because anti-corruption agencies are frequently frustrated by their failure to secure information and effectively cooperate with the public prosecutions bodies. To some extent this was also observed in the EU Anti-Corruption Report, which indirectly mentioned that there is a lack of cooperation between the investigatory bodies and public prosecution offices when dealing with high-level corruption cases in some Member States.

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<sup>678</sup> Graycar, A and R.G. Smith (2011), *Handbook of Global Research and Practice in Corruption*. Cheltenham: Edward Elgar Publishing, pp. 443 – 465.

<sup>679</sup> Meagher, P (2005), 'Anti-corruption agencies: Rhetoric versus reality.' *The Journal of Policy Reform*, 8(1), pp. 69-103.

Thus, the EU Anti-Corruption Report in the next Report could promote and enhance further for better cooperation between anti-corruptions agencies, which have investigatory powers with the general public prosecutor office. Furthermore, the next EU Anti-Corruption Report could also promote cooperation between anti-corruption agencies and civil society organisations that are concerned with anti-corruption activities in the Member States.<sup>680</sup> This will enhance further the involvement of civil society in the activities of the anti-corruption agencies and make them more transparent to the public.

Lastly, the future EU Anti-Corruption Reports could ensure that the anti-corruption agencies cooperate with other anti-corruption agencies in the region in sharing information and providing assistance in cross-border arrests of corruption suspects. Such a fresh approach of regional cooperation would also help to tackle issues that are related to cross border crime, which the EU Anti-Corruption Report aims at addressing in its long-term objectives.

Future EU Anti-Corruption Reports, by also including an evaluation of national anti-corruption agencies within the scope of the Report, would also strengthen a few key components of the theory of reflexive governance. Firstly, the EU Anti-Corruption Report, by recommending to the Member States to make their anti-corruption agencies come into line with international standards and ensure that these anti-corruption agencies have implemented the so-called Jakarta Statement on Principles for Anti-Corruption Agencies, would strengthen further the theory of reflexive governance component: global interaction. Secondly, the EU Anti-Corruption Report, by supporting the Member States' anti-corruption agencies to cooperate with other anti-corruption agencies and other organisations, would also strengthen further the theory of reflexive governance component: active participation. Thirdly and most importantly,

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<sup>680</sup> Kett, P. (2014), 'The Role of the G20 and B20 in the Fight Against Corruption'. pp. 287-93. Chapter in Manacorda, S., Centonze, F., and Forti, G., (eds) *Preventing Corporate Corruption: The Anti-Bribery Compliance Model*. Cham, Heidelberg, New York, Dordrecht, London: Springer.

the EU Anti-Corruption Report, by evaluating the effectiveness of anti-corruption agencies in the Member States, would also strengthen further the theory of reflexive governance component: regulation of self-regulation. The Report, by highlighting some of the shortcomings of anti-corruption agencies in the Member States, would trigger a process for the Member States to engage in regulation of self-regulation. The Member States, through the EU Anti-Corruption Report, would acknowledge their anti-corruption agencies' shortcomings and, in improving their foundation as well as resources, would have to engage in a regulation of self-regulation process. Thus, the inclusion of evaluating the effectiveness of anti-corruption agencies in the EU Anti-Corruption Report would strengthen the reflexive governance approach in several ways and support Member States to have more effective anti-corruption agencies in place.

### **5.8 Supporting a full E-Procurement in the EU and the Member States**

The EU Anti-Corruption Report identified that corruption in public procurement was a serious threat to the EU and dedicated a thematic chapter to the topic. The Report has also indirectly indicated that, in order to reduce and prevent corruption in public procurement, establishing a fully e-procurement system would be beneficial. Neupane finds that e-procurement can increase transparency and accountability of the procurement process by enhancing the connections between public officials and citizens, as well as tracking their actions, refining monitoring and control instruments to decrease the possibility of corrupt behaviour.<sup>681</sup> E-Procurement is seen as an innovative tool for the future to increase the level of transparency in public procurement systems and reducing corrupt practices, especially in tendering of public contracts. So far, e-procurement in the EU has been introduced at a rapid pace through technologies that are being employed in tendering for public works and interacting in e-

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<sup>681</sup> Nurmandi, A and K. Sunhyuk (2015), 'Making e-procurement work in a decentralized procurement system', *International Journal of Public Sector Management*, **28**(3), pp.198-220.

marketplaces.<sup>682</sup> E-Procurement is also at a low cost and the use of technology has enhanced the efficiency in stirring up governments' investments in e-procurement.

However, many EU Member States have not supported the prospect of establishing full e-procurement in their states. The EU Commission, in the next EU Anti-Corruption Report, could consider to take the initiative to push further the agenda for establishing full e-procurement throughout the EU Member States. The EU Commission can play a role in supporting the process of establishing full e-procurement in the Member States and, in the next EU Anti-Corruption Report, can suggest best practices of the advantages of introducing an e-procurement system. In the public procurement directives, there is a general support for a wider implementation of e-procurement, because it is perceived to be an effective tool for reducing corruption and increasing integrity.<sup>683</sup>

Globally, South Korea was one of the first countries to implement a full e-procurement in 1997.<sup>684</sup> The South Korean model is considered as one of the best practice examples in implementing a system that covers all steps of the procurement process. The Europe 2020 agenda under the 'Digital Agenda for Europe', in its strategy, is pushing for a full a full e-procurement by 2020 across the European Union.<sup>685</sup> This is an optimistic step forward in implement full e-procurement systems throughout the EU. However, in the next EU Anti-Corruption Report, the EU Commission could give examples of best practice to emphasise more clearly the importance of connecting e-procurement capacities across the EU and give

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<sup>682</sup> Khorana, S. and K, B. Ferguson, and K. A. William (2015), 'Governance Issues in the EU's E-Procurement Framework', *JCMS: Journal of Common Market Studies*, **53**(2), pp. 292-310.

<sup>683</sup> Sjøfjell, B and A. Wiesbrock, (2015), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder*. Cambridge: Cambridge University Press, pp. 230-242.

<sup>684</sup> Murat A. Y, and T.K. Travis (2012), *Designing Public Procurement Policy in Developing Countries: How to Foster Technology Transfer and Industrialization in the Global Economy*, London: Springer Publisher International Publishing, pp. 141- 156.

<sup>685</sup> Lemstra, W. and W. H. Melody (2014), *The Dynamics of Broadband Markets in Europe Realizing the 2020 Digital Agenda*. Cambridge: Cambridge University Press, pp. 25-52

proper guidance for supporting full e-procurement systems in all of the Member States.

The example of South Korea is a success story, as the government in 1997 wanted to reform its non-transparent and corrupt public procurement system. Once the implementation of a full e-procurement system occurred, it was shown that such a previously corrupt system can see substantial improvements in efficiency and reduce corruption.<sup>686</sup> It is estimated that the South Korean state saved around \$2.5bn a year since implementing e-procurement systems. Also, the implementation of a full e-procurement system in South Korea saw an improvement in public trust and, more importantly, the reduction of corrupt behaviour between officials and contractors for tenders.<sup>687</sup>

Thus, the EU Commission could consider to include guidance to Member States in implementing a full e-procurement system and making e-procurement in the EU an integral part of good governance practice. This would increase efficiency in public administration and reduce corruption, in particular for public tenders.<sup>688</sup> Furthermore, the EU Anti-Corruption Report can be a key tool to contribute in fulfilling the Europe 2020 agenda objective for a having in place full e-procurement by 2020 across the European Union.<sup>689</sup>

The EU Anti-Corruption Report, by supporting Member States to implement a full e-procurement system, would also strengthen the theory of reflexive governance component: innovative problem – solving. The reflexive governance component suggests that the reflexive component, innovative problem – solving, enables Member States to engage in a

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<sup>686</sup> World Bank (2004), Korea's move to e-procurement. Retrieved from: <http://www1.worldbank.org/prem/PREMNotes/premnote90.pdf>

<sup>687</sup> World Bank (2016), Governance & Anti-Corruption. Retrieved from: <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/0,,menuPK:1740542~pagePK:64168427~piPK:64168435~theSitePK:1740530,00.html>

<sup>688</sup> European Commission (2011), Communication Fighting Corruption in the EU. COM (2011) 308 final.

<sup>689</sup> Lemstra, W. and W.H. Melody (2014), *The Dynamics of Broadband Markets in Europe Realising the 2020 Digital Agenda*. Cambridge: Cambridge University Press, pp. 25-52.



process of innovation and can use innovative tools to solve policy shortcomings. The EU Anti-Corruption Report has identified on numerous occasions that Member States have a serious problem in addressing corruption in public procurement and, by engaging in innovative experimentalism to use technology, such as an e-procurement system, it would contribute in lowering corruption, as well as making public procurement contracts more transparent. Thus, the EU Commission in the future EU Anti-Corruption Report, by supporting Member States to implement a full e-procurement system, would also have to use the component of the theory of reflexive governance - innovative problem – solving - in order to support Member States to find new solutions to address corruption in public procurement.

### **5.9 Including Organised Crime to the EU Anti-Corruption policy objectives**

The EU Commission, in the next EU Anti-Corruption Report, could also extend its anti-corruption policy agenda in addressing the policy and legal gaps to fight against organised crime more effectively. The rationale behind this suggestion is that corruption and organised crime often go together. Furthermore, in order to support Member States to design a comprehensive anti-corruption policy, it should also include to some extent tackling organised crime. This is because organised crime groups feed corruption and often organised crime groups actively try to corrupt customs officials, immigration authorities, law enforcement, the judiciary and procurement processes to gain access to sensitive information, as well as to pass law enforcement boundaries. Three criminal phenomena – organised crime, corruption, and money laundering - are often very closely related; thus, in order to design effective anti-corruption policy, it is imperative to include them all at the same time.

Susan Rose-Ackerman finds that organised crime needs corruption as an enabler tool for some organised criminal activities.<sup>690</sup> If not for corruption, some of the illicit activities by organised crime groups would not flourish. Europol has identified about 3,600 organised crime groups operating in the European Union, but the cost of organised crime at EU level is very difficult to measure.<sup>691</sup> This is also due to the difficulty in collecting independently data from organised crime offenders. A study by the European Commission in 2013 suggested that crimes such as fraud range from 500 million euros to 5 billion euros in the European Union.<sup>692</sup>

In the recommendations made by the EU Anti-Corruption Report in Chapter 2 to the EU Member States, it can be identified that many post-communist countries had issues with organised crime, corruption, and money laundering. Research on post-communist countries has identified that the collapse of the communist system benefited both legitimate investors and organised crime groups. This was due to the entire wealth of the state in the post-communist countries being up for grabs at lower or no cost. Both legitimate businesses and criminal groups sought to share in the wealth in these countries. In some post-communist countries, organised crime groups managed to create an atmosphere of insecurity and the threat of violence that drove competitors away – especially recognised international firms.<sup>693</sup> Thus, this left the criminal groups with an open field to get state entities and share the wealth of the state. Foreign investment from legitimate business was reduced in post-communist countries and these examples are also witnessed in Western Balkan countries currently.<sup>694</sup> Kukhianidze noted in his account that this behaviour is caused by the

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<sup>690</sup> Rose-Ackerman, S and B.J. Palifka (2016), *Corruption and Government: Causes, Consequences, and Reform*. Cambridge: Cambridge University Press, pp. 294 – 316.

<sup>691</sup> Europol (2013) Report on EU Serious and Organised Crime Threat Assessment, pp. 6. Retrieved from: <https://www.europol.europa.eu/content/eu-serious-and-organised-crime-threat-assessment-socta>

<sup>692</sup> Hafner, M. and J. Taylor, E. Disley, S. Thebes, M. Barberi, M. Stepanek and Mike Levi (2016), *The Cost of Non-Europe in the area of Organised Crime and Corruption: Annex II - Corruption*. Santa Monica: CA: RAND Corporation, Retrieved from: [http://www.rand.org/pubs/research\\_reports/RR1483.html](http://www.rand.org/pubs/research_reports/RR1483.html).

<sup>693</sup> Rose-Ackerman, S and B.J. Palifka (2016), *Corruption and Government: Causes, Consequences, and Reform*. Cambridge: Cambridge University Press, pp. 294 – 316.

<sup>694</sup> Zeneli, V (2015), 'Corruption, Foreign Direct Investment, and International Marketing in the Western Balkans'. *Thunderbird International Business Review*, **58**(3), pp. 277 – 291.

weakness of state institutions, which created an environment for the growth of organised crime groups and thus allowed them to use corruption to infiltrate governments and businesses.<sup>695</sup>

The goal in this section here is not to try to resolve the problem of organised crime, nor should the EU Anti-Corruption Report attempt to solve it. Rather, it is to make a case that addressing organised crime should also be involved in designing anti-corruption policies in the EU and the Member States. Also, to argue that corruption is a symptom of deeper problems and when organised crime has a strong foothold, many of the anti-corruption reform proposals will only have a superficial effect. Thus, thinking also about organised crime and reflecting on policy shortcomings would be beneficial in designing future EU Anti-Corruption Reports, as well as supporting the EU Member States to establish a comprehensive anti-corruption policy.

A study conducted by the European Parliamentary Research Service identifies that there are barriers in the fight against organised crime and the main obstacles are that there is a lack of ratification, transposition, implementation and enforcement in the EU.<sup>696</sup> The research finds that there is a lack of horizontal and vertical integration in terms of the consistency with monitoring instruments regarding organised crime. The main examples are in relation to the rule of law more generally and criminal law, as well as between international, EU, national, regional and local governance levels. A possible explanation of the lack of implementation of adequate standards may be a reflection of many factors - mainly cornering institutional capacity and the political will of pushing higher the agenda on tackling organised crime. In some Member States, the recommendations of the EU Anti-Corruption Report suggested that anti-corruption agencies, police and judicial authorities face difficulties and challenges in their effectiveness due

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<sup>695</sup> Kukhianidze, A (2009), 'Corruption and organized crime in Georgia before and after the 'Rose Revolution'', *Central Asian Survey*, 28(2), pp. 215 – 234.

<sup>696</sup> Hafner, M. and J. Taylor, E. Disley, S. Thebes, M. Barberi, M. Stepanek and Mike Levi (2016), *The Cost of Non-Europe in the area of Organised Crime and Corruption: Annex II - Corruption*. Santa Monica: CA: RAND Corporation, Retrieved from: [http://www.rand.org/pubs/research\\_reports/RR1483.html](http://www.rand.org/pubs/research_reports/RR1483.html).

to insufficient resources and, in some cases, due to politicisation. It must be noted that, in this area, it remains a shared competence between the EU and its Member States, but the Member States remain in charge of law enforcement and judicial procedures to fight organised crime.

Thus, the EU Anti-Corruption Report in the future Reports could take into account the gaps of Member States in the policymaking process and shortcomings when addressing corruption to also involve the issue concerning organised crime. Future EU Anti-Corruption Reports could also address the lack of conceptual clarity concerning the relationship between corruption and organised crime. Furthermore, the next EU Anti-Corruption Report could support the actions of the Member States in the field of crime prevention and help to strengthen police and judicial cooperation between Member State law enforcement agencies. This cooperation and support will help national authorities to fulfil their full potential and achieve better results in fighting corruption and organised crime. Thus, it can be argued that this support by the EU Anti-Corruption Report in also addressing the issue involving organised crime would help Member States to develop a comprehensive anti-corruption policy field.

The EU Anti-Corruption Report, by emphasising the importance to the Member States to also include addressing organised crime, would also strengthen the theory of reflexive governance component: proceduralism. The reflexive governance approach proceduralism allows for multi-level actors and areas to be part of a process in policymaking. The research above suggests that organised crime is highly related to corruption and the EU Anti-Corruption Report would have a positive impact in supporting Member States to develop a comprehensive anti-corruption policy by also including organised crime. The reflexive governance component, proceduralism, would enable Member States to ensure that, when a future anti-corruption action plan is designed, organised crime is also included. Thus, future EU Anti-Corruption Reports would contribute better in supporting Member States to develop a more efficient anti-corruption policy by also including addressing organised crime.

### **5.10 Inclusion of EU Candidate Countries in the EU Anti-Corruption Report**

The Communication of the EU Commission in 2011 on setting up the EU Anti-Corruption Report indicated under the heading ‘Stronger focus on corruption in EU external policies’<sup>697</sup> that the EU Anti-Corruption Report once it was published would also include the Candidate countries, potential candidates and neighbourhood countries within the scope of the Report. However, when the EU Anti-Corruption Report was issued in 2014, the Report did not cover an evaluation of the anti-corruption policy and efforts of Candidate countries, potential candidates and neighbourhood countries as it did for the Member States.

Future EU Anti-Corruption Reports could include at least the Candidate Countries from the Western Balkans within the EU Anti-Corruption Report and thus the Commission could go back to its promise in 2011 to also include the Candidate Countries, potential candidates and neighbourhood countries in the Report. The inclusion of these countries within the scope of the EU Anti-Corruption Report would also contribute to the EU Commission objective in making the Report a comprehensive and far-reaching monitoring instrument.

There is a strong case why the EU Commission could consider including at least the six Western Balkan countries; Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro and Serbia in future EU Anti-Corruption Reports. The common objective of joining the EU unites these six Western Balkans countries and there are ways in which would be mutually beneficial for the EU Commission and these six countries to be part of the EU Anti-Corruption Report in particular to develop an anti-corruption policy field in these countries.<sup>698</sup>

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<sup>697</sup> European Commission (2011), Communication Fighting Corruption in the EU. COM (2011) 308 final.

<sup>698</sup> Kurtoglu, M.G and A. Komsuoglu (2015), ‘A critical assessment of the transformative power of EU reforms on reducing corruption in the Balkans’, *Southeast European and Black Sea Studies*, **15** (3), pp. 301-326.

All six countries are parties to the United Nations Convention Against Corruption and have ratified the Council of Europe Civil Law, and Criminal Law Conventions on Corruption with the support of the EU.<sup>699</sup> Furthermore, the EU has supported successive national governments of the Western Balkan to develop anti-corruption strategies and action plans, as well legislation to strengthen the prevention of corruption. For example, the EU supported the Law on Protection of Whistleblowers in Albania<sup>700</sup> that came into force in 2016 and in Serbia 2015.<sup>701</sup> Montenegro is another example where the EU has further supported strengthening its anti-corruption legal framework and a new anti-corruption agency that will be set up sometimes in 2016.<sup>702</sup> Another example in Bosnia and Herzegovina where the EU has supported efforts to adopted the law on the agency for prevention of corruption.<sup>703</sup>

All these efforts and initiatives by the EU Commission have been supported under the Commission's Instrument for Pre-Accession Assistance (IPA), which saw €11.5 billion spent in the six Western Balkans countries and Turkey between the year 2007 to 2013.<sup>704</sup> The IPA funded project ranging from solar energy start-ups to promoting more diversity and women in national politics. However, around €485 million was spent on the rule of law projects. According to a Report issued on 13<sup>th</sup> of September 2016 from the European Court of Auditors on the EU Commission's anti-corruption

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<sup>699</sup> UNODC Report (2011), Corruption in the Western Balkans: Bribery as experienced by the population. For more available at; [http://www.unodc.org/documents/data-and-analysis/statistics/corruption/Western\\_balkans\\_corruption\\_report\\_2011\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/statistics/corruption/Western_balkans_corruption_report_2011_web.pdf)

<sup>700</sup> The Law on Whistleblowing and the Protection of Whistleblowers passed by 75 votes in favor, with 1 abstention in the Albanian Parliament. The Act of Parliament on Protection of Whistleblowers, available on; <https://www.parlament.al/wp-content/uploads/2016/06/ligj-nr.-60-dt.-2.6.2016.pdf>

<sup>701</sup> The National Assembly of the Republic of Serbia adopted the Law on Protection of Whistleblowers on 4 December 2014, and came into force on 5<sup>th</sup> of June 2015. For more available at; <http://www.balkaninsight.com/en/article/whistleblowers-get-better-protection-in-serbia>

<sup>702</sup> European Parliament (2016), Resolution on the 2015 report on Montenegro (2015/2894(RSP))

<sup>703</sup> European Commission (2011), Instrument for Pre-Accession Assistance (IPA II) 2014 – 2020: Supporting rule of law enforcement agencies in Bosnia and Herzegovina.

<sup>704</sup> European Commission (2013), Annual Report on Financial Assistance for Enlargement (IPA, PHARE, CARDS, Turkey Pre-accession Instrument, Transition Facility).

efforts in the Western Balkans found that around 2% of the total IPA budget was spent on the fight against corruption and organised crime.<sup>705</sup> Yet, corruption and organised crime are widespread in six Western Balkans countries. No country of the six Western Balkans countries scored less than 60 on the Transparency International Corruption Perceptions Index 2015.<sup>706</sup> This assessment by Transparency International indicates that there serious concern with corruption in the Western Balkans countries.

The geography positions of the six Western Balkans countries have made this region a gateway between Europe, the Middle East, and Asia for organised crime. The fragile regional governance ranging from low level of law enforcement to the judiciary makes it relatively easy for organised criminal networks to engage in narcotic trade and human trafficking, and weapons smuggling into the EU.<sup>707</sup> The shortest route usually from Afghanistan, which produces around 90% of the heroin that comes into the European market, passes through the Western Balkans countries through Turkey, which is known as the Balkans route.<sup>708</sup> As a result, the countries of the Western Balkans have established themselves as a haven for low-risk and high-profit criminal enterprise. The profit margins, especially for trafficking narcotics, is estimated by the UNODC to be around €2 billion per year in which law enforcement officials have become endemic to corruption by criminal network forces.<sup>709</sup> The EU Commission's annual Enlargement Reports for six Western Balkans countries generally concludes that there is limited progress in fighting organised crime and anti-corruption

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<sup>705</sup> European Court of Auditors (2016), Special Report; EU pre-accession assistance for strengthening administrative capacity in the Western Balkans: A meta-audit, No 21. For more available at; [http://www.eca.europa.eu/Lists/News/NEWS1609\\_13/SR\\_WESTERN-BALKANS\\_EN.pdf](http://www.eca.europa.eu/Lists/News/NEWS1609_13/SR_WESTERN-BALKANS_EN.pdf)

<sup>706</sup> Transparency International Corruption Perceptions Index 2015. Available at; <https://www.transparency.org/cpi2015#results-table>

<sup>707</sup> European Parliament (2016), Briefing on the Western Balkans Frontline of the migrant crisis. Available at; [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573949/EPRS\\_BRI\(2016\)5739\\_49\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573949/EPRS_BRI(2016)5739_49_EN.pdf)

<sup>708</sup> Lorenzo, C.A (2015), *State-Building in Kosovo: Democracy, Corruption and the EU in the Balkans*. London & New York: I.B Tauris & Co Ltd. pp. 100 – 101.

<sup>709</sup> United Nations Office on Drugs and Crime (2015), Report on Drug Money: the illicit proceeds of opiates trafficked on the Balkan route. Available at; [https://www.unodc.org/documents/data-and-analysis/Studies/IFF\\_report\\_2015\\_final\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/Studies/IFF_report_2015_final_web.pdf)

policy in the region. One could argue that is a diplomatic tone to express that the Western Balkans countries are not making sufficient progress in fighting corruption and organised crime.

Faced with challenges of this magnitude and little resources spend on strengthening anti-corruption and law enforcement agencies in the Western Balkans, questions could be raised whether the EU Commission through its Instrument for Pre-Accession Assistance (IPA) pack is getting sufficient results. In the view of the Report from the European Court of Auditors on the European Commission's anti-corruption efforts in the Western Balkans finds that 'free media and a strong civil society are key drivers for raising public awareness of corruption and organised crime as they often encourage anti-corruption agencies and the public prosecution to act. In return, contributes directly to a track record of effective investigation, prosecution and final convictions in judicial cases of high-level corruption and organised crime.'<sup>710</sup> Furthermore, the Report from the European Court of Auditors on the European Commission's anti-corruption efforts in the Western finds that 'the Commission allocated relatively little funding to media freedom and civil society in the Western Balkans, which amounts around 0.5 % in total of the IPA budget allocations'.<sup>711</sup> For example, in the case of Albania, the IPA did not allocate any budget for media freedom and civil society in the context of the fight against corruption. Also, the EU Commission allocated around 2 % of the IPA funding to the fight against corruption and organised crime, and only as little as 1 % for supporting the public prosecution services in their efforts of addressing cases related to corruption and organised crime.<sup>712</sup>

On the basis of the findings of the Report by the European Court of Auditors on the European Commission's anti-corruption efforts in the Western Balkans, the EU Commission could consider changing its

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<sup>710</sup> European Court of Auditors (2016), Special Report; EU pre-accession assistance for strengthening administrative capacity in the Western Balkans: A meta-audit, No 21.

<sup>711</sup> European Court of Auditors (2016), Special Report; EU pre-accession assistance for strengthening administrative capacity in the Western Balkans: A meta-audit, No 21.

<sup>712</sup> European Court of Auditors (2016), Special Report; EU pre-accession assistance for strengthening administrative capacity in the Western Balkans: A meta-audit, No 21.



approach in addressing an anti-corruption shortcoming in the Western Balkans by including them within the scope of the EU Anti-Corruption Report. This approach would increase the profile and awareness of issue of anti-corruption shortcomings and support them to enhance their anti-corruption policy efforts. The EU Commission could consider including the six Western Balkans countries after the Berlin Process for the Western Balkan is concluded.

The Berlin Process started with the 2014 Conference of Western Balkan States in Berlin<sup>713</sup> and is designed to keep the dynamics in EU integration process in the light of increased Euroscepticism after the EU Parliamentary election in 2014. The Berlin Process is a flagship of German diplomatic initiatives of the Merkel Government, which will run from 2014 to 2018 to keep the Western Balkan's EU perspective hopes within the European Union. This initiative by the Merkel Government has transient a positive momentum for regional cooperation in which is anticipated to have an economic and social impact that will keep the aspiration of the EU membership in place in the Western Balkan region until negotiations for accession start to take place.<sup>714</sup>

The Berlin Process as an intergovernmental cooperation initiative also aims at ensuring that there is an inclusion of civil society participation in the whole process of policymaking for the propose of EU integration.<sup>715</sup> Thus, it also supports civil society participation in anti-corruption policymaking and one can anticipate that by 2018 it would have a positive impact in improving the institutional framework for addressing issues related to corruption more effectively. Therefore, it might be feasible for the EU Commission to consider including the six Western Balkans countries in the EU Anti-Corruption Report after the Berlin Process is concluded in 2018.

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<sup>713</sup> European Commission (2014), Daily News, 26 / 08 / 14.

<sup>714</sup> Balfour, R and C. Stratulat (2015) 'EU member states and enlargement towards the Balkans', *European Policy Centre, EPC Issue Paper NO. 79, ISSN 1782-494X*.

<sup>715</sup> European Parliament Think Tank (2016), Briefing on The Western Balkans' Berlin process: A new impulse for regional cooperation. Available at; [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586602/EPRS\\_BRI\(2016\)586602\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586602/EPRS_BRI(2016)586602_EN.pdf)

In line with reflexive governance approach, the inclusion of the EU Candidate States within the scope of the EU Anti-Corruption Report would further strengthen the mutual learning and regulation of self-regulation component of the Report.

### **5.11 Conclusion**

This chapter has attempted to evaluate achievements of the EU Anti-Corruption Report in the two years since its launch in 2014. A central question was to which extent the reflexive governance approach adopted by the EU Anti-Corruption Report had an impact on Member States as well as accession candidates in developing anti-corruption as a policy field. The research could show that the EU Anti-Corruption Report has made a positive contribution in raising the profile of the need to address corruption in the three countries under investigation. Furthermore, the EU Anti-Corruption Report has successfully made Member States and candidate countries aware of policy shortcomings in addressing areas and levels of corruption at national level. There is also evidence that the attempt of the EU Anti-Corruption Report to increase the involvement of civil society and business leaders in fighting corruption has been successful in some Member States, for example constructive interactions between Transparency International and the UK government that the reflexive governance approach of the EU Anti-Corruption Report was successful in establishing conditions for mutual learning of Member States from each others best policy practice and models in fighting corruption.

The research could also show that the EU Anti-Corruption Report could be improved by making further use of the reflexive governance approach and by including additional areas in the next Anti-Corruption Report. The following shortcomings and recommendations can be highlighted for consideration in future EU Anti-Corruption Reports.

First, the omission of evaluation of EU institutions in the first EU Anti-Corruption Report should be reversed and the original plan in the official

Report of 2011 of assessing corruption at the supranational level should be reconsidered. Including the EU institutions within the scope of the EU Anti-Corruption Report would give more credibility to the Report. Furthermore, by also including the EU institutions within the EU Anti-Corruption Report, it would strengthen the reflexive governance approach component in terms of regulation of self-regulation.

Second, there might be an advantage in involving Member States as well as civil society and private sector representatives at earlier stages in preparing the Report, rather than just consulting different stakeholders half a year prior to publication. Involving a wider range of actors at an earlier stage might lead to a more coherent and better-focused Report. It would be in line with the reflexive governance approach of a wider participation and interaction with relevant actors in anti-corruption policymaking.

Third, in order to foster the dialogue between the various actors involved in developing national and supranational anticorruption policies, an interim Anti-Corruption Report could be issued after the first year of the launch of the official biannual Anti-Corruption Report. The experiment with interim reports could build on the experience of the CVM that operates with interim reports every half year with the aim to keep the anti-corruption policy discussion high on the agenda. This approach would also strengthen key features of the reflexive governance approach, including collective and mutual learning.

Fourth, future EU Anti-Corruption Report might choose as thematic topic the protection of whistleblowers that are instrumental in reporting corruption wrongdoings. Similar to the thematic chapter on public procurement in the first EU Anti-Corruption Report such focus would evaluate all Member States efforts and legal instruments in protecting whistleblowers. In any case future Reports should make recommendations for improving the legal protection for whistleblowers on a regular basis.

Fifth, future EU Anti-Corruption Reports could improve their support for the introduction and running of specialised anti-corruption institutions. The Report could assist, in line with its reflexive governance approach, national anticorruption bodies by commenting on their autonomy, the guarantee of independent investigating powers and their interaction with civil society organisations fighting corruption. For the evaluation of specialised anti-corruption institutions, future EU Anti-Corruption Report could establish a set of benchmarks derived from international standards. This would be in line with the adopted reflexive governance approach that favours supporting global interaction and active participation of non-governmental actors.

Sixth, the second EU Anti-Corruption Report could improve by enlarging the concern with procurement. In particular this would include assisting Member States in introducing an e-procurement system. Establishing such an e-procurement system would increase transparency and accountability of the procurement process. Furthermore, an e-procurement system is an innovative tool that can help Member States in reducing corruption practices, especially in tendering of public contracts. It would be in line with reflexive governance that favours innovative problem solving.

Seven, the second EU Anti-Corruption Report could improve by highlighting the close links between corruption and organised crime. Including the fight against organised crime as an objective of anticorruption policy would make anti-corruption policies more comprehensive. In line with reflexive governance it would support Member States in their self-regulatory efforts by opening up avenues of combining resources that make both fighting corruption and organised crime more effective.

Eight, future EU Anti-Corruption Reports could improve by including neighbouring and in particular EU candidate countries within the scope of the Report. Including neighbouring and candidate countries are in the interest of the EU in fighting effectively organised crime and corruption. In line with reflexive governance it would support candidate countries in

mutual learning and their self-regulatory process in constructing adequate anti-corruption policies that are in line with the EU anti-corruption standards.

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